Supreme Court, U.S.
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In The

Supreme Court of the United States

IN RE SCOTT A. HEIMERMANN,

Petitioner

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS

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QUESTIONS PRESENTED

1. Does the petitioner's conviction and sentence of life imprisonment violate the Due Process Clause of the Fourteenth Amendment where petitioner was framed for a double murder he did not commit and where federal and state law enforcement and prosecuting authorities knowingly allowed perjured testimony and deliberately fabricated evidence in order to obtain the conviction of petitioner?

2. Did the authorities' continuing malfeasance in sustaining the cover-up of the alleged framing of petitioner for the 1989 murders deprive petitioner of meaningful corrective judicial process by which his conviction so obtained may be set aside and of liberty without due process of law which the Fourteenth Amendment requires?

LIST OF PARTIES

SCOTT A. HEIMERMANN is the petitioner.

In making the habeas application here there is no named respondent in light of this Court's Rule 20.2. On the other hand, should the United States Supreme Court elect to grant leave to file the petition for certiorari (in lieu of the petition for original writ of habeas corpus), and thus review the discretionary orders of the Wisconsin Supreme Court entered in this case on March 8, 2005, BRADLEY G. GEHRING and the STATE OF WISCONSIN are the respondents.

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SUPREME COURT RULE 20.1 DECLARATION

The undersigned submits that the principles of the United States Supreme Court's Rule 20.1 are met in the case at bar. That "the writ will be in the aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court" is explained by the petitioner as follows: The Supreme Court may not have jurisdiction under any other statute authorizing issuance of such orders that may be necessary to persons who, though not parties to the original action, are nevertheless affirmatively engaged in hindering the administration of justice as offered in the present petition and appendix. But the All Writs Act of 28 U.S.C. § 1651(a) authorizes this Court to issue writs not specifically provided for by statute, which may be necessary for the exercise of this Court's jurisdiction in order to allow petitioner a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence.

About exceptional circumstances presented in this case: The undersigned thinks they exist by virtue of the framing of petitioner for a double murder he did not commit and authorities' continuing malfeasance in sustaining the cover-up of the alleged framing. In the undersigned's judgment it is difficult to imagine circumstances more exceptional, more removed from what this country stands for, than that level of the government's malevolence alleged in the present petition and appendix.

In answering the remaining question whether relief to petitioner can be obtained in any other form or from any other court: The undersigned is of the opinion that experience has been shown beyond all doubt, in any practical sense, the remedies potentially available in the Wisconsin

courts, or the federal judiciary, are inadequate. This is true because in fact no remedy exists, or because any remedy available is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult.

SUPREME COURT RULE 20.4(a) DECLARATION

The undersigned submits that the mandates of the Supreme Court's Rule 20.4(a) are equally satisfied here. That the petitioner must show the "reasons for not making application to the district court of the district in which the applicant is held," and "that exceptional circumstances warrant the exercise of the Court's powers", and "that adequate relief cannot be obtained in any other form or from any other court" is explained as follows: As a condition precedent to federal relief in the United States District Court for the Eastern District of Wisconsin, the United States Court of Appeals for the Seventh Circuit recently insisted in an unpublished order of February 4, 2003 (App. 17 to App. 18 of this petition), that the district courts encompassing the Seventh Circuit reject any filings until petitioner pays sanctions in the amount of $5,000.00. Because petitioner currently is destitute, that he has no assets, and petitioner is unemployed because he has been illegally imprisoned for some fourteen years, petitioner is unable to pay the sanction, and perforce, there is no avenue open in the district court to process the instant petition.

Regarding whether petitioner has exhausted state remedies or otherwise comes within the provisions of 28 U.S.C. § 2254(b)(1): It has always been clear that the exhaustion rule may be applied even in extreme situations like the case at bar. *See Mooney v. Holahan,* 294 U.S. 103, 115, 55 S. Ct. 340, 343 (1935). Here petitioner has presented habeas corpus and post-conviction applications to

obtain his freedom twenty to twenty-five times in order to escape the procedural maze of the Wisconsin courts. These applications were denied on which no testimony of witnesses or evidence was ever taken by the courts on the hereabout claims. In his most recent state post-conviction filing, he challenged the jurisdiction of the court which convicted him, and alleged new evidence of abusive and criminal government conduct having the effect of voiding that conviction on due process grounds as offered in the present petition. These appeals were denied. *See State v. Heimerman,* Case No. 03-3213 (Wis. App. October 19, 2004) (summary affirmance). The record and order of the Wisconsin Court of Appeals (District I) is reprinted at App. 9 to App. 12 of this petition. In addition, petitioner recently filed a motion to reinstate a four-year-old state habeas corpus case, also where he had advanced the same issues like the aforementioned post-conviction filing. This state habeas case, which like petitioner's post-conviction appeals, was denied. *See State ex rel. Heimermann v. Gehring and State of Wisconsin,* Case No. 04-0414 (Wis. App. December 14, 2004) (summary affirmance). The record and order of the Wisconsin Court of Appeals (District III) is reprinted at App. 1 to App. 4 of this petition. The Wisconsin Supreme Court denied review in these appeals. (App. 7 to App. 8 and App. 15 and App. 16 of this petition.) Consequently, petitioner submits that the Wisconsin remedies are exhausted here.

To establish that "exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court," has been firmly established by petitioner in his Rule 20.1 declaration above. Put simply, the effect of the Wisconsin authorities' framing petitioner for the 1989 murders, and a procedural situation so muddled by authorities' long-standing cover-up of the alleged framing meaningful review cannot be obtained in

any other form or anywhere else, and thus is critical here to interpose the United States Supreme Court between the state and the petitioner, as a guardian of the petitioner's – federal rights – to protect the petitioner from further unconstitutional action. *Reed v. Ross,* 468 U.S. 1, 10, 104 S. Ct. 2901 (1984).

PETITION FOR ORIGINAL WRIT OF HABEAS CORPUS OR IN THE ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

The Petitioner Scott A. Heimermann ("Petitioner"), respectfully prays that a writ of original habeas corpus issue or, in the alternative, that a writ of certiorari issue to review the discretionary orders of the Wisconsin Supreme Court entered in this case on March 8, 2005 and the judgment below be vacated and remanded to the Circuit Court of Outagamie County, Wisconsin for petitioner's release from prison.

OPINIONS BELOW

The opinions below to the present proceeding are prefaced by post-conviction and habeas applications to obtain petitioner's freedom. These petitions and motions were denied on which no testimony of witnesses or evidence was ever taken in the state courts of Wisconsin and the United States District Court for the Eastern District of Wisconsin, which opinions petitioner attaches for review at App. 1 to App. 34 of this petition.

JURISDICTION

The jurisdiction of the United States Supreme Court to grant habeas corpus relief to petitioner is invoked pursuant to the court's original habeas jurisdiction, 28 U.S.C. §§ 1651(a) or 2241(a). The jurisdiction of the United

States Supreme Court to review the discretionary orders of the Wisconsin Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

This case involves the Privileges and Immunities Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses, including 28 U.S.C. §§ 1651(a), and 2241 to 2254.

STATEMENT OF THE CASE

This case presents a flagrant example of deprivation of due process. Petitioner is illegally confined in the Wisconsin prison system under a 1991 conviction for the August 19, 1989 murders of Black Gangster Disciples Muhammad D. Binwalee ("Binwalee") and Dion Russell ("Russell"). Binwalee and Russell were murdered at a dwelling located in Milwaukee, Wisconsin. Recently Petitioner sought a writ of habeas corpus in the Circuit Court of Outagamie County, Wisconsin, alleging that the court which convicted him lacked jurisdiction, and the subsequent new evidence of abusive and criminal government conduct had the effect of voiding that conviction on due process grounds. That court, after a hearing, denied the writ; and also it denied a motion to reinstate the habeas corpus case, where petitioner, in his motion, detailed that Wisconsin authorities procured the earlier dismissal of the writ by fraud. Even though habeas corpus is the general remedy under Wisconsin law for cases want of jurisdiction and deprivation of Constitutional rights

whenever events have the effect of voiding a conviction,[1] the Wisconsin courts ruled that habeas corpus did not lie in petitioner's case. (App. 1 to App. 8 of this petition.) Petitioner then assumed that post-conviction would be the appropriate remedy. So petitioner sought post-conviction relief in the circuit court of Milwaukee County, Wisconsin, alleging the same issue like the habeas corpus case. Even though petitioner argued that his efforts to bring his claims to the forefront earlier were the result of Wisconsin authorities' campaign of actively deceiving everyone, including the courts, not to mention several governors, regarding the truth of his wrongful prosecution, the Wisconsin courts ruled that post-conviction was not the appropriate remedy either because petitioner allegedly did not show a combination of facts to establish a "sufficient reason" why he did not present his factual questions of want of jurisdiction and due process on one of his previous post-conviction motions. (App. 9 to App. 16 of this petition.) So petitioner had been required to ride the Wisconsin merry-go-round of habeas corpus, post-conviction, and state appeals without ever getting a hearing on his claims in any court on the hereupon claims.

The present case comes to the United States Supreme Court on a petition for original writ of habeas corpus or, in the alternative, a petition for writ of certiorari to review the recent discretionary orders of the Wisconsin Supreme Court. (App. 7 to App. 8 of this petition.) The questions for decision are: (1) that petitioner's conviction and sentence of life imprisonment violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution,

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[1] *See State ex rel. Zdanzewicz v. State,* 131 Wis. 2d 147, 151, 388 N.W. 2d 612 (1986); *State ex rel. Doxtator v. Murphy,* 248 Wis. 593, 602 22 N.W. 2d 685, 689 (1946).

because the sole basis of petitioner's conviction was that he was framed for a double homicide he did not commit and where supervisors of federal and state intelligence law enforcement agencies knowingly allowed (and at worst enabled) perjured testimony and deliberately fabricated evidence, which was knowingly used by Wisconsin prosecuting authorities in order to obtain that conviction of an actual innocent man, all to cover-up law enforcement agents' criminal activities surrounding the 1989 murders; (2) that petitioner could not through due diligence have discovered the truth about his wrongful prosecution until at least sometime after 2002 no matter how hard he worked at it because of the authorities' continuing malfeasance in sustaining the cover-up so that petitioner couldn't impeach that perjured testimony and fabricated evidence used against him constituted a denial of due process; and (3) that authorities deprived petitioner of his liberty without due process of law by its crime of obstruction of justice, in the circumstances set forth in the instant petition, affording no meaningful corrective judicial process by which a conviction so obtained may be set aside.

In support of these detailed and serious charges, petitioner alleges in the present petition and appendix of the petition, a chronological history of the 1991 trial, post-trial appeals, and various other judicial proceedings connected with his conviction, including Governor responses to his applications for executive clemency. The petition and appendix set forth the evidence which, as petitioner contends, proves that he was framed for a murder he did not commit, proves the deliberate fabrication of the testimony of the witnesses and other evidence by Wisconsin authorities, including proving the cover-up of law enforcement agents' criminal activities surrounding the 1989 murders upon which petitioner's conviction rests. Petitioner also submits what he insists are admissions by state agents and confidential paid informants that the

testimony and evidence offered against him was perjured and deliberately fabricated and that his conviction is presumptively void – that is a conviction lacking Constitutionally guaranteed procedures plainly detectable from a facial examination of the record. To further support these submissions, petitioner respectfully requests the United States Supreme Court to order that the State of Wisconsin, through the state's Attorney General, supplement the record with copies of all transcripts, post-conviction motions, habeas petitions and briefs filed in this matter in the Circuit Courts of Milwaukee and Outagamie Counties, Wisconsin, Circuit Court of Broward County, Florida, United States District Court for the Eastern District of Wisconsin and Court of Appeals for the Seventh Circuit, including statements of Governors of Wisconsin on applications for executive clemency made on behalf of petitioner.

A. FACTUAL AND PROCEDURAL HISTORY

1. Law Enforcement Agencies' Relationship With Edward J. Piscitello and Their Knowledge of the Murders

For present purposes, the operative facts are drawn from the record submitted in *State v. Heimermann,* Milwaukee County case numbers 91CF911492 and 91CF911618, along with the record submitted in *State ex rel. Heimermann v. Bradley Gehring and State of Wisconsin,* Outagamie County case number 99-CV-0072, and summaries and documents submitted in the appendix of this petition. Petitioner compiles the following account of the facts by reading those state court records and those submissions in the appendix of this petition, drawing all reasonable inferences therefrom in the light most agreeable to him.

Shortly before his murder, Binwalee was a Federal Bureau of Investigation ("FBI") "top ten" wanted fugitive for a gangland slaying in Chicago in the month of July of 1988. (App. 98 to App. 102 of this petition.) At the time, the FBI also had learned that Binwalee was living in Milwaukee (App. 102 of this petition) and that, indeed, Milwaukee Police Department ("MPD") Detectives Barry Debraska Jr. ("Debraska") and Thomas Gorecki ("Gorecki") (who also was MPD's liaison to the Drug Enforcement Administration ("DEA")), at the time were working out of MPD headquarters with responsibility for investigating Binwalee and his Black Gangster Disciples and various other members of organized crime in Milwaukee. Indeed, during the summer of 1989, Milwaukee police for not having a driver's permit had arrested Binwalee. According to Edward J. Piscitello ("Piscitello"), Debraska interceded on Binwalee's behalf so that Binwalee could be released from jail. (App. 55 to App. 56 of this petition.) This apparently was done so that Debraska and company could resume the ongoing investigations against Binwalee and his Black Gangster Disciples.[2]

In the course of Debraska's and Gorecki's work, they cultivated a number of relationships with confidential informants, including Piscitello. Apparently, Debraska and Gorecki's interest in Piscitello was because he was a former important high-ranking member of the notorious

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[2] For any person trained to sharpen the point on guilt, like a lawyer or detective, one might view Debraska facilitating Binwalee's release from the Milwaukee County jail was a proximate cause of Binwalee's death. The record recites that after Binwalee's release from jail The Debraska Team was alerted that the murders were forthcoming, but had refused to intervene, figuring it would jeopardize their undercover operations. (App. 47 and App. 56 of this petition.) Not one warning to Binwalee and Russell, and not one bit of conscience in The Debraska Team. Reckless homicide is what lawyers and detectives call that.

Outlaw's Motorcycle Gang. (App. 56 and App. 59 of this petition.) It was an apparent long-standing actual and customary practice for Debraska, Gorecki, and other fellow U.S. agents, and their supervisors (the "Debraska Team," for short) to protect Piscitello from investigation and prosecution for maintaining him as a very valuable source of information in the government's quest to prosecute drug traffickers and members of organized crime. The allegations include assertions that The Debraska Team ignored – and even permitted – criminal activities of Piscitello that foreseeably was aimed at eliminating rival drug traffickers. Specifically, The Debraska Team knew that, notwithstanding their relationship with Piscitello, he kept on committing crimes and The Debraska Team knew that Piscitello knew of, or participated in the slayings of Binwalee and his companion Russell *before* their deaths were brought to light in March 1991. Indeed, for sure as early as January 14, 1991, The Debraska Team were told of a Piscitello confession to the 1989 murders – "admitted killing the two BOS gang members" and in a dying declaration, one of the victims (Russell) "told Piscitello immediately before the shooting that he wanted his 'mom' told where he could be found." (App. 95 and App. 97.) Additionally, in pre-trial handwritten notes authored by Piscitello's former trial attorney, Jill Tan, of the Wisconsin State Public Defender's Office dated June 7, 1991 and November 12, 1991, confirms that The Debraska Team "asked [Piscitello] to participate in illegal activities" and, when "asked by the cops to do illegal things . . . . he [Piscitello] does them." (App. 75 of this petition.)[3]

[3] Regarding Attorney Tan's notes, it would seem that Piscitello has waived any claim of attorney-client privilege. At Piscitello's own volition, he provided these notes to petitioner and with no other interest to be served here; it is evidence of a waiver.

The Debraska Team apparently did not share details of Piscitello's actions in connection to the murders of Binwalee and Russell with Customs agents and other U.S. agencies at the time. Over the next year after Binwalee's murder, Piscitello helped Customs and other U.S. agencies apprehend or implicate several "big fish", such as Bobby Theno and other top drug smugglers in the states of Florida, Kentucky, Ohio and Wisconsin areas. (App. 69 to App. 70 and App. 86 to App. 88 of this petition.)

Again, Milwaukee Office IRS Special Agent Michael Spang ("Spang") wrote in an April 21, 1991 memorandum to then Milwaukee County Assistant District Attorney Jon N. Reddin ("Reddin"), that in January of 1991, Spang and several detectives of the Washington County Sheriff's Office ("WCSO") urged Piscitello to engage a lawyer to assist him in drafting an "immunity letter" in connection to the murders of Binwalee and Russell, despite the fact that Spang and WCSO detectives knew that Piscitello admitted killing Binwalee and Russell. (App. 95 and App. 97 of this petition.) Spang further states in this memo that Piscitello said that he and a "second person" (Isajiw) were involved in the slayings of Binwalee and Russell. Piscitello, however, did not say that any third person (i.e., petitioner) was involved in the murders. *Id.*

The Debraska Team apparently reined in Piscitello in the month of February in 1991, but by then, he confessed to U.S. officials that he participated in the killings of Binwalee and Russell.

The testimony and police reports as established by Debraska and Gorecki, and Spang and Customs Special Agent Buford E. Gates ("Gates") confirms that Piscitello was working under the scope of employment for The Debraska Team before, during, and after the murders, and in April of 1989 when he egregiously invaded petitioner's

innocent life. Exhibits attached to Piscitello's affidavits of the appendix to this petition date back to July of 1989, during the time The Debraska Team was closing in on Binwalee and his Black Gangster Disciples. (App. 78 to App. 82 of this petition.) It details the point that Piscitello was under the scope of employment for The Debraska Team and that the South 35th Street dwelling sold to petitioner by Piscitello (the government) was offered up by Piscitello to The Debraska Team to facilitate the undercover operations. Gorecki and Debraska further corroborated those reports at Piscitello's trial. (Tr. 12/05/91 at 78-83.) Gorecki testified that he worked with Piscitello "10-15" times as an undercover informant. He testified that Piscitello met Binwalee and Russell in 1989, and was at the time an undercover drug informant on MPD's payroll. Piscitello in such a capacity introduced Binwalee and Russell to Gorecki. He found Piscitello reliable. (Tr. 12/05/91 at 80.) Debraska also testified that he worked with Piscitello as an undercover drug informant in the months leading up to Binwalee and Russell's murder and after them. He testified that Piscitello met Binwalee and Russell in 1989, and that Piscitello was on MPD's payroll. Piscitello in such a capacity introduced Binwalee and Russell to Debraska. Debraska made six (6) convictions relating to members of Binwalee's Black Gangster Disciples due to Piscitello's help in 1989. He worked with Piscitello 2-3 years. Debraska found Piscitello's information reliable. (Tr. 12/05/91 at 82-83.) Additionally, Customs Agents Gates and Spang apparently deemed Piscitello to have provided reliable information. (App. 89 and App. 96 of this petition.) Lastly, at Piscitello's sentencing hearing on December 20, 1991, then Milwaukee County Assistant District Attorney Karen Christenson ("Christenson") confirmed that Piscitello had been on the government's payroll as a confidential informant at the

time he egregiously invaded petitioner's innocent life in April of 1989. Indeed, Christenson stated to the court that Piscitello: "made at least part of his living by selling information, by snitching to both state agencies and federal agencies over a period of a number of years." (Tr. 12/20/91 at 5.)

None of this information was revealed during either the prosecution or the post-trial proceedings of petitioner.

2. Prosecution

On March 7, 1991, MPD homicide Detectives Vincent Vitale ("Vitale"), Brian O'Keefe ("O'Keefe"), Paul Stuhmer ("Stuhmer"), Ronald Castillo ("Castillo") including Chief Deputy District Attorney Robert Donohoo ("Donohoo") and Reddin arranged to meet with Piscitello. (App. 43 to App. 47 and App. 60 to App. 62 of this petition.) Despite these law enforcement officials' knowledge of Piscitello's confession to the Binwalee and Russell murders, these authorities did not place Piscitello under arrest. Rather, they induced Piscitello to cooperate with their investigation of the Binwalee and Russell murders.

These prosecutors and detectives then took formal statements from Piscitello on March 7, 1991 and March 11, 1991, which were converted to affidavit form on March 13, 1991. (App. 60 to App. 65 of this petition.)

Based on Piscitello's statements and testimony, a search warrant was executed at the residence at 941 South 35th Street, located in Milwaukee, Wisconsin on March 8, 1991. The transcript of the search warrant application held on March 8, 1991, reveals that O'Keefe vouched for the reliability of Piscitello.

Although the prosecutors and detectives confirmed the veracity of Piscitello's truthfulness in March of 1991, nevertheless Christenson used those same March 1991 statements to undermine the credence of Piscitello, in his trial. (App. 48 to App. 49 and App. 62 to App. 67.) It is hard to fathom the reason for all this, especially where the prosecutors and detectives gave credence to Piscitello in one way, at the March 8, 1991 search warrant hearing, and then yet another way in an affidavit on March 13, 1991, even though these authorities *then* knew Piscitello to be lying about the circumstances surrounding the murders. But today the answer is clear, and that is, The Debraska Team unloaded their involvement in the 1989 murders on Piscitello, getting Piscitello to sign the highly questionable March 1991 statements and affidavits, when he was under the impression of promises that he would receive immunity from prosecution in the murders. Then after the search warrant proceedings the prosecutors and detectives pulled the rug out and build a murder case against Piscitello, reversing the scam. Piscitello now gets his hand in the murders while The Debraska Team remain pure and unaffiliated with the murders. That way Piscitello becomes stigmatized as a liar and murderer, and so who is going to listen to him about The Debraska Teams' continuing malfeasance in sustaining the cover-up of the alleged framing of petitioner. It's one rotten scenario, but it's classic. Piscitello truly believed that he's been given immunity from prosecution in the murders, but he doesn't realize he's on the hook for life while The Debraska Team are off it. This not only proves that Piscitello lied about petitioner's involvement in the murders back in March of 1991, but also proves petitioner's innocence (i.e., it proves that the context of the 1998, 1999 and 2002 Piscitello affidavits (App. 40 to App. 71 of this petition)), at least as they involve petitioner, are consistent

with all-but Piscitello's March 1991 statements, where prosecutors and detectives provided Piscitello as a witness *knowing* he would falsely implicate petitioner).[4]

Also prior to trial, prosecutors and detectives induced Joseph Isajiw ("Isajiw") to cooperate in their investigation of the 1989 murders by conveying information to him that supposedly caused him to fear for his brother (Nicholas Isajiw) being dragged into the murders. In an interview, prosecutors and detectives told Isajiw they were interested in recovering the guns used in the homicides. Isajiw replied that the guns were in possession of a "family member" and that he was reluctant to get a "relative" involved in the case. Isajiw further told detectives that he would attempt to accomplish the recovery of the murder weapons, "if arrangements could be made to keep his

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[4] Likewise, for the sake of argument, the probative force of the 1998, 1999 and 2002 Piscitello affidavits is de minimis if he has a proven status as a liar. But on the basis of this, it could only serve to cement petitioner's resolve, to use Piscitello solely as a reference point like the hieroglyphics of the ancient Maya, and thus petitioner connecting the dots in the end through *self-authenticating* sources, all the pieces lacking, as they were to now prove his actual innocence claim and allegations of deliberate fabrication of evidence, frame-up and cover-up by Wisconsin authorities, without the need any longer for petitioner to rely on the likely credibility of Piscitello. In *Mataya v. Kingston*, 371 F. 3d 353, 357-359 (7th Cir. 2004), the Seventh Circuit recently indicated that the concept of "self-validating" oral evidence is just as reliable in the law as documentary evidence, notwithstanding the witness in question having a history of not always telling the truth. Thus, under the *Mataya* standard, it simply cannot be said that the Piscitello affidavit context is not to be believed on the basis of his proven status as a liar in this very case, since it is "self-validating", i.e., through self-authenticating attorney and law enforcement documents that Piscitello was, in fact, working under the scope of employment with The Debraska Team before, during, and after the 1989 murders, and in April of 1989 when he egregiously invaded petitioner's innocent life.

'relatives' out of this matter." (App. 104 of this petition.)[5] Petitioner submits, rather correctly, that the "relative" or "family member" whom Isajiw refers to is, brother Nicholas Isajiw. Again, pre-trial handwritten notes taken by Piscitello's former trial Attorney Tan, dated November 12, 1991, confirm that before the actual execution of Binwalee and Russell, "{Isajiw} called Nick about burying the bodies." (App. 76 of this petition.) During this discourse between Isajiw and brother Nick they also talked about burying Binwalee and Russell "2 ft down" and putting "concrete over" them so that "no one will ever smell it." In addition, according to Attorney Tan's notes, Isajiw told Piscitello that the weapons used in the killings could be obtained "through Nick." (App. 76 of this petition.) Despite detectives and prosecutors having this information from the outset (App. 45 to App. 46 and App. 56 to App. 57 of this petition), Nick was never charged as an accessory before and after the fact of murder. In a word, Isajiw told prosecutors and detectives directly that he would falsely implicate petitioner in the 1989 murders if they permitted him, in turn, to keep his "family member" or "relative" (i.e., brother Nick) out of the picture whom he didn't want involved one way or another. The prosecutors and detectives continued to develop Isajiw as a witness against petitioner even though their information plainly contradicted his account of the events surrounding the Binwalee and Russell murders.

In short, the state prosecution of petitioner was procured and nurtured by the upper echelons of federal and state intelligence and law enforcement agencies allowing perjured testimony of Isajiw and Piscitello and

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[5] According to Isajiw's testimony at Piscitello's trial, when Isajiw was asked the whereabouts of the murder weapons, he responded that they were "misplaced" and thus suddenly any attempts by police to retrieve the murder weapons were dropped. (Tr. 12/03/91 at 99.)

deliberately fabricating evidence, which was knowingly used by Wisconsin prosecuting authorities in order to obtain that conviction of an actual innocent man.

3. Conviction and Cover-Up

On December 12, 1991, petitioner was convicted of the Binwalee and Russell murders in the Circuit Court for Milwaukee County following a trial by jury; he was sentenced to two consecutive life terms of imprisonment on February 25, 1992. *See State v. Heimermann,* Case No. 95-0225-CR, unpublished slip op. (Wis. App. August 8, 1995).

Petitioner alleges that at various times from the murders of Binwalee and Russell to the present, upper echelons of various federal and state intelligence and law enforcement agencies in Milwaukee, Wisconsin Department of Justice and of the Wisconsin Department of Corrections ("WDOC"), along with detectives of WCSO and Dodge County Sheriff's Office ("DCSO"), took affirmative steps to keep the truth from him and to keep secret evidence that would exonerate petitioner.

Petitioner alleges that from early-1991 to October of 2002, authorities took affirmative steps to keep sealed the March 8, 1991 search warrant transcripts, the April 15, 1991 arrest warrant transcripts, and the April 19, 1991 extradition warrant records from him and to keep secret this "release recipe" evidence that would exonerate petitioner. The search warrant and arrest warrant transcripts remained sealed by court order until March of 1998. The extradition records remained sealed by court order until October of 2002. The search warrant and arrest warrant records recites the relationship between Piscitello and The Debraska Team. The extradition records recites that petitioner was extradited from Fort Lauderdale, Florida to

Milwaukee, Wisconsin on a *misdemeanor* offense.[6] Thus, in absence of these transcripts and records, petitioner had only his strong suspicions but no proof of what authorities had actually done; he could not get *all* the proof because of the authorities' continuing malfeasance in sustaining the cover-up.

In June of 1998, DCSO and upper echelon WDOC authorities initiated contact with petitioner at Dodge Correctional Institution ("DCI") in Waupun, Wisconsin, and engaged petitioner to assist federal and state authorities regarding breach of security issues within the state's prisons. Thereafter, petitioner was recruited to go undercover by DCSO and WDOC authorities and provided critical evidence in an ongoing staff and inmate investigation for some two months. (App. 106 to App. 107 of this petition.)

DCSO and WDOC authorities agreed to help petitioner obtain an oral deposition from Piscitello (who at the time was in witness protection custody at an undisclosed out-of-state facility) in exchange for Petitioner's assistance in the Fecke operations. However, in truth, these officials had no intention to ever helping petitioner with making Piscitello available for deposition. For example, one WDOC employee, Ilene Lawson, sent June 3, 1999 and June 7, 1999 correspondence regarding the Piscitello oral deposition to petitioner saying: "I have made a good faith effort to try and set this up and to date there is no cooperation." (App. 109 of this petition.) Thus, DCSO and WDOC authorities' plan from the outset was to get petitioner to help

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[6] Armed with this evidence, under the legal rule of *United States v. Rauscher,* 119 U.S. 407, 419-20, 7 S. Ct. 234, 240 (1886), for example, petitioner could have advanced a viable claim that the murder prosecution against him was barred because his extradition arose from a misdemeanor offense under Wis. Stat. § 940.34(2)(a).

them bring to fruition the apprehension of Fecke through the ruse of promising to help him obtain Piscitello's oral deposition, that way these officials could wipe out *both* Fecke and the petitioner at the same time. Petitioner was trying vis-a-vis Fecke to find the truth; while simultaneously Wisconsin authorities were trying to cut it off.

In February of 1999, DCSO and WDOC officials channeled false information to the Circuit Court for Outagamie County at the February 12, 1999 hearing on petitioner's state-court habeas petition. Specifically, DCSO Detective Joanne Swyers ("Swyers") testified that petitioner was under investigation and possible indictment for practicing law without a license and for involvement in a prison drug trafficking operation. The information provided by Swyers was false; petitioner was never involved in practicing law without a license and nor was he ever involved in any drug activity. Rather correctional staff and other inmates at the institution where petitioner resided at the time (DCI) were indicted and later convicted for various state criminal offenses. *See, e.g., State v. Robert Fecke,* Case No. 02-1598, unpublished slip op. (Wis. App. May 8, 2003).

DCSO and WDOC authorities also deliberately omitted other pertinent information from the Circuit Court for Outagamie County at the habeas hearing on February 12, 1999. DCSO and WDOC authorities deliberately covered-up and withheld evidence that the investigations against former prison guard Robert Fecke had, in fact, been because Fecke was "leaking" confidential security information about Piscitello's informant status to petitioner, relative to petitioner, clearing his name in the 1989 murders (*not* "drug" investigations like authorities claimed); parallel operations that were one but not one, just the sort of thing to confuse and dissuade the State Court Judge from granting petitioner's state habeas

petition. It worked. State Judge Joseph M. Troy entered a written order on March 1, 1999 denying the habeas petition.

In 2003, petitioner applied to State Judge Troy to reinstate the state habeas case, claiming fraud on the court by DCSO and WDOC officials at the February 12, 1999 hearing. Again, on each occasion employees of the Wisconsin Department of Justice sought to discourage Judge Troy from granting the petitioner's motions to reinstate the habeas case. As a result, petitioner's motions were turned down, after more stonewalling and receipt of more bogus information from Wisconsin authorities.

In 2002 and 2004, petitioner applied for a governor's pardon of his conviction and sentence. Again, Wisconsin authorities continued to withhold information that would have exonerated petitioner in the Binwalee and Russell murders. As a result, Governor Scott McCallum on February 18, 2002, and Governor James E. Doyle on May 4, 2004, turned down petitioner's applications for pardons. (App. 35 to App. 36 of this petition.)

Throughout all of the post-trial proceedings at which petitioner challenged the same judgment he now challenges, petitioner demanded exculpatory evidence. No information was disclosed until late-1998 to early-2004 when the last piece of information necessary (Attorney Tan's notes) – confirmed Piscitello's accounts of the facts as alleged that Wisconsin authorities were in fact enabling, encouraging, and covering up the frame-up of petitioner and perjurious trial testimony. From that point, petitioner was able to 'walk back the cat' on the events, as they are now revealed.

In short, this case involves far more than the run-of-the-mill *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963) (non-disclosure of exculpatory materials) and *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972)

(allegations relating to false testimony) decisions. It involves an intricate cover-up of illegal behavior made possible by supervisors of federal and state intelligence and law enforcement agencies ignoring or at worst assisting in the illegal conduct of their subordinates' concealment of material facts related to the illegal prosecution of petitioner.

4. Actual Innocence and Frame-Up[7]

For the reasons set forth above and below, petitioner is an actual innocent man and employees of the government framed him for a double homicide he did not commit.

In April of 1989, Piscitello in the scope of his employment with the MPD identified a naive small town farm boy,[8] or vulnerable person such as petitioner to be a 'lead recruit'[9] to get at other persons in The Debraska Teams'

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[7] The facts in support of petitioner's actual innocence and framing of petitioner are *voluminous* and would go way beyond the text of the 30 page limit for petitions. Therefore, since those detailed allegations are so relevant to the present petition, they will only succinctly be outlined here, together with such comprehensive facts to follow at any anticipated evidentiary hearing in this case.

[8] Petitioner grew up on his family's dairy farm in small rural Chilton, Wisconsin. By mid-1984, petitioner decided his career ambitions by more in real estate and finance than in dairy farming. He sat for and passed the notoriously challenging real estate broker's examination, and became a licensed real estate broker on August 24, 1984, in the state of Wisconsin. (App. 37 to App. 38 of this petition.) While still living at his parents' dairy farm, petitioner decided to try to focus on his financial future in Milwaukee, Wisconsin in June of 1986 at the age of 25, with just a few thousand dollars to invest in real estate. So he formed H.A.S. Investments Incorporated ("HAS"), his real estate investment and finance vehicle. (App. 39 to this petition.) Up to the time of petitioner's arrest on April 18, 1991, he was self-employed in real estate investments and finance in the Milwaukee and Fort Lauderdale, Florida areas.

[9] In law enforcement parlance, a 'lead recruit' is someone who is unwarily used by intelligence officials to get at known targets of an

(Continued on following page)

ongoing undercover operations. No facts whatsoever pointed to any involvement by petitioner in any criminal activity for validating Piscitello and The Debraska Team to egregiously invade petitioner's innocent life at the time. Indeed, the trial record recites petitioner was talking with real estate clients in a Marquette College Campus hangout in the City of Milwaukee, when Piscitello initiated contact with him in 1989. (App. 52 to App. 53 of this petition.)

From April of 1989 to August of 1989, Piscitello in the scope of his employment with the MPD charmed petitioner with financial support, such as where Piscitello told petitioner he (Piscitello) represented a two million dollar estate and has connections to federal government real estate auctions and Piscitello always took petitioner on multiple real estate showings. Because of this, petitioner saw Piscitello as supportive and he (petitioner) wanted to appreciate Piscitello in return and did so by permitting Piscitello to move in with him as a roommate. (App. 45 and App. 54 of this petition.)

So the facts, as now revealed, irrefutably show that petitioner was not a party to the 1989 murders but merely he was an innocent bystander – *involved by accident*. Petitioner was caught up as an innocent and unintended victim in a major undercover investigation of law enforcement, both

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investigation. In other words, to The Debraska Team and Piscitello, petitioner merely was an unknowing instrument of instruction should there be anything they might use from him in the undercover operations. And when they weren't using petitioner in the operations, Piscitello was using petitioner to personally benefit from real estate deals. Indeed, during cross-examination of Piscitello at his trial, Christenson queried Piscitello about whether he was attracted to petitioner because he knew how to do real estate deals. "Yeah, and make the fast buck," Piscitello replied. (Tr. 12/05/91 at 52-53.) In a word, the Debraska Team and Piscitello manipulated Petitioner into the undercover operation situation by using his Real Estate Profession as a trap.

state and federal, aimed at someone else, while he was meeting with real estate clients in a Marquette College campus hangout in the City of Milwaukee. Thus, the ultimate and unavoidable issue is, but for Piscitello (the government) egregiously invading petitioner's innocent life in that Milwaukee University campus club in April of 1989, and The Debraska Teams' undercover operations that followed it, the shootings of Binwalee and Russell would not have even occurred involving petitioner.

Or, put another way, assuming petitioner was living at the residence at 941 South 35th Street alone, *without* Piscitello (the government), would the 1989 shootings have even occurred? It's a simple question. Could any reasonable person conclude that the 1989 shootings would have occurred involving petitioner if he were living at that residence alone?

Indeed, by way of analogy, were the instant case an insurance law one, grounded on evidence that petitioner was the innocent and unintended victim of a drive-by shooting while talking with a real estate client in front of an apartment building, that although petitioner was standing next to the intended target of the attack (i.e., the real estate client), this would not mean that petitioner was intentionally shot, thereby availing petitioner's heirs of sizable insurance reparations under the life insurance policy's double indemnity clause for *accidental* death. Here petitioner was the innocent and unintended victim of The Debraska Teams' undercover operations while talking with real estate clients in a Milwaukee University campus club when the government egregiously invaded his innocent life, and The Debraska Team undercover operations that followed it, serves the link to involving petitioner in the 1989 murders – by accident.

Given these circumstances, the instant petition presents such a case where it no longer establishes a crime

by petitioner, it does not even establish petitioner participating in the 1989 homicides, it does not establish petitioner aiding and abetting Isajiw and Piscitello as a matter of objective fact, it simply places petitioner at the scene of the crime *by accident.*

On the undisputed facts, no reasonable fact-finder could reach another conclusion. Petitioner is an actual innocent man and he was framed for a double homicide he did not commit, pure and simple.

REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE SOLE BASIS FOR PETITIONER'S CONVICTION IS THAT HE WAS FRAMED FOR A DOUBLE MURDER HE DID NOT COMMIT AND PERJURED TESTIMONY AND DELIBERATELY FABRICATED EVIDENCE WHICH SUBVERTS AND INTERDICTS THE FOURTEENTH AMENDMENT RIGHTS OF THE PETITIONER IN THE CASE AT BAR.

If any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit. One court of appeals recently had found a clearly established Constitutional right against being criminally charged based on deliberately fabricated evidence even though there were no prior cases expressly recognizing the specific right – "[p]erhaps because the proposition is virtually self-evident." *Devereaux v. Abbey,* 263 F. 3d 1070, 1074-75 (9th Cir. 2001) (en banc). The Court of Appeals for the Ninth Circuit went on to note that action taken in contravention of this prohibition necessarily violated due process. *Id.*

Petitioner's Constitutional claim boils down to shocking and detailed allegations of deliberate fabrication of evidence by Wisconsin authorities: Fabrication of evidence to establish probable cause for petitioner's arrest and extradition from Florida and fabrication of evidence to obtain the underlying criminal complaint and his conviction. As discussed above, Wisconsin authorities knew from the onset, based in part on statements that they took from Piscitello and The Debraska Team, and other evidence still in the possession of the authorities, both state and federal, that petitioner was caught up as an innocent and unintended victim in a major undercover operation of law enforcement authorities, aimed at someone else, while petitioner was meeting with real estate clients in a Marquette College campus hangout in the City of Milwaukee in April of 1989. Thereafter, when one of law enforcements' very own (Piscitello) and a target of those investigations (Isajiw) gunned down certain other targets of the undercover operations (Binwalee and Russell), prosecutors and detectives nonetheless banded together and participated in the development of Piscitello and Isajiw with respect to the prosecution of petitioner despite *knowing* they would falsely implicate petitioner; and as such, framed petitioner in the 1989 murders in order to cover-up whatever sordid dealings Piscitello and The Debraska Team were involved in. The Circuit Court of Appeals for the Ninth Circuit had declared such a deliberate framing under color of official sanction to be highly impermissible and unconstitutional. *See Devereaux,* 263 F. 3d at 1074-75.

Moreover, evidence obtained in such encounters that is in violation of the Fourteenth Amendment, including direct products of law enforcement misconduct and evidence derived from illegal government conduct, cannot be used in a criminal trial against a victim of such illegal government activity. *See Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205 (1952) (violation of Fourteenth Amendment right to due

process of law). Here the facts, as now revealed, show that Wisconsin prosecuting authorities were not concerned with law enforcement but rather decided to be outlaws themselves.

In short, the framing of petitioner and authorities' continuing malfeasance in sustaining the cover-up of the alleged framing of petitioner – is shocking and outrageous, beyond civilized standards. Indeed, it is difficult to imagine conduct more shocking and outrageous, more removed from what this country stands for, than the conduct alleged in this petition and appendix – "After all, the FBI is generally thought to be concerned with *law enforcement* and not an outlaw itself." *Bennett v. F.B.I.,* 278 F. Supp. 2d 104, 110 (D. Mass. 2003) (emphasis in original).

This Petition offers a very rare and exceptional case for the United States Supreme Court to define the Constitutional parameters of deliberate framing under color of official sanction.

II.

THE WRIT SHOULD BE GRANTED BECAUSE AUTHORITIES DEPRIVED PETITIONER OF DUE PROCESS OF LAW BY CONSPIRING TO COVER-UP THE FRAME-UP OF PETITIONER AND PERJURIOUS TRIAL TESTIMONY AND DID NOT PROVIDE ANY MEANINGFUL CORRECTIVE JUDICIAL PROCESS BY WHICH PETITIONER'S CONVICTION SO OBTAINED COULD BE SET ASIDE.

The United States Supreme Court very recently declared such a restriction to be highly impermissible and unconstitutional. *See Christopher v. Harbury,* 536 U.S. 403, 413-14, 122 S. Ct. 2179 (2002). Under the *Harbury* rule, this Court expressly noted that the Constitution guarantees a plaintiff the right of meaningful access to the courts, the denial of which is established where a party

engaged in pre-filing actions which effectively covers-up evidence and actually renders any court remedies ineffective. This right is grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petitions Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses. *Id.* at 415 n. 12, 122 S. Ct. 2179. In a so-called "backward-looking" denial of access to courts claim, "the official acts claimed to have denied access may allegedly have caused the loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief." *See id.* at 414, 122 S. Ct. 2179 (internal citations omitted).

However, while *Harbury* did not involve post-conviction misconduct, that is a distinction without a difference on the facts of the case at bar. The instant petition of petitioner is sufficient to state a backwards-looking denial of access claim in a criminal trial context, because no other remedy is currently available to restore petitioner's liberty. After his conviction, petitioner presented no fewer than twenty state court post-conviction motions, five state court habeas petitions, and six state appeals (not to mention eight applications for federal habeas corpus relief) without ever securing a hearing on the truth of the hereunder serious allegations in the courts. And so from 1991 to the date of the instant petition, petitioner has essentially been shut out of the courts, having no meaningful corrective judicial process by which petitioner's conviction so obtained can be reversed.

Moreover, the level of specificity that petitioner must establish is that he actually was injured by the activity that constituted the denial of meaningful judicial corrective process. The instant petition and appendix meets those tests. What petitioner has here, and what the evidence unmistakably shows, is The Debraska Team

took it upon themselves to involve petitioner as an innocent and unintended victim in undercover operations directed at someone else; who concealed from petitioner crucial evidence of his innocence in the 1989 murders; and, also, where other Wisconsin authorities had known of the significance of helping petitioner locate Piscitello and thereupon promised to help petitioner successfully obtain Piscitellio's oral deposition, relative to petitioner clearing his name in the 1989 murders. These authorities' promises to petitioner were ultimately never followed, as they knew they would not be, and in the aggregate were of the same effect as the crime of obstruction of justice. To put authorities' crime of obstruction of justice in proper prospective: Petitioner's legal proceedings, after legal proceedings could work only if the state courts, and the federal judiciary, including the United States Supreme Court, were not impeded with and only if they got to the facts of the relationship evidence of Piscitello and The Debraska Team. Justice required access to documentary evidence and true testimony from Piscitello and his case officers with this information. The Debraska Team and other Wisconsin authorities accomplished these feats because they were most responsible for guarding the sanctity of the judicial system in the state courts, and the federal judiciary. These courts put their complete trust in these authorities, as they knew the courts would, and they recklessly abused it. And so the record supports specific findings regarding the circumstances under which no meaningful corrective judicial process was done in one of petitioner's legal proceedings, then in another, and then there was no justice for any of petitioner's actions.

This Petition offers a unique and uniquely egregious opportunity for the United States Supreme Court to extend the rule of *Harbury* by which providing a remedy to innocent defendants subjected to abusive and criminal

government conduct in a criminal proceeding or where a favorable determination of a criminal proceeding against a criminal defendant previously was ineffective or meaningless because government officials affirmatively conspired to keep the truth from coming out.

CONCLUSION

In light of the undisputed facts, as now revealed, the undersigned respectfully submits that the United States Supreme Court should conclude that petitioner was denied the due process of law which the Fourteenth Amendment requires.

For the foregoing reasons the petitioner's petition should be granted, and petitioner should be released to outright freedom because after a thorough review of the irrefutable facts, the state of Wisconsin authorities do not have a good faith basis – legally or ethically – to enforce any further restraint of the petitioner's liberty.

Dated at Waupun, Wisconsin, this 1st day of June 2005.

Respectfully submitted,

SCOTT A. HEIMERMANN
Counsel for Petitioner
200 South Madison Street
Post Office Box 0351
Waupun, Wisconsin 53963-0351
Tel: 920-324-5571

VERIFICATION

Petitioner, Scott A. Heimermann, as an incarcerated individual, and in the absence of immediate notary service, hereby declares the foregoing petition and appendix to this petition under penalty of perjury, pursuant

to 28 U.S.C. § 1746; that he is the petitioner in the above petition; that he has read the contents of same and personally knows the contents thereof; and that the same is true and correct.

Executed at Waupun, Wisconsin, this 1st day of June 2005.

By: /s/ Scott A. Heimermann
Scott A. Heimermann

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DISTRICT III

December 14, 2004

To:

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You are hereby notified that the Court has entered the following opinion and order:

04-0414 State of Wisconsin ex rel. Scott A. Heimermann v. Bradley G. Gehring and State of Wisconsin (L.C. #99CV000072)

Before Cane, C.J., Hoover, P.J., and Peterson, J.

Scott Heimermann appeals an order denying his WIS. STAT. § 806.07[1] motion for relief from a 1999 judgment denying habeas corpus relief. Heimermann argues that new evidence shows that state and county officials fraudulently misled the court at his hearing on the habeas corpus petition. The trial court denied relief under WIS. STAT. § 806.07 because Heimermann is no longer detained in Outagamie County, the motion is untimely and the appropriate remedy for the alleged defects is a new motion or petition in the county of conviction or the county in which he is incarcerated. Upon our review of the briefs and record at conference, we conclude that the trial court's order is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

Heimermann was convicted of two counts of first-degree intentional homicide in Milwaukee County in 1992. In 1999, while housed at the Outagamie County Jail, he filed a petition for a writ of habeas corpus alleging that Dodge County and state officials breached an agreement to release him from prison in return for his cooperation in a drug investigation. Heimermann also claimed that his conviction was invalid because state officials conspired to unlawfully prosecute him. The trial court found that there was no agreement that Heimermann would be released and further concluded that if there were, it would be unenforceable as against public policy. The court also determined that the alleged conspiracy to unlawfully prosecute Heimermann was an attack on his conviction that should be decided by the Milwaukee County Circuit Court.

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

In October 2003, Heimermann filed a motion under WIS. STAT. § 806.07 for relief from the judgment dismissing the habeas petition. He now alleges that Dodge County and state officials breached an agreement to help him locate a witness who could have provided a basis for challenging the Milwaukee County court's subject matter jurisdiction to enter his 1992 convictions. He alleges that state officials misled the court as to the nature of the investigation he cooperated with and, if they had correctly described the investigation, the court would have considered his challenge to Milwaukee County's jurisdiction.

The trial court properly exercised its discretion when it denied relief under WIS. STAT. § 806.07 for several reasons. First, newly discovered evidence should be presented by motion under WIS. STAT. § 974.06 in the county of conviction. ***See State v. Avery***, 213 Wis. 2d 228, 233-34, 570 N.W.2d 573 (Ct. App. 1997). Relief under habeas corpus will not be granted where other adequate remedies at law exist. ***State ex rel. Dowe v. Waukesha County Cir. Ct.***, 184 Wis. 2d 724, 729, 516 N.W.2d 714 (1994). Furthermore, the alleged misrepresentation of the nature of the investigation does not affect the trial court's finding that there was no agreement that Heimermann would be released or its conclusion that any such agreement would be unenforceable as against public policy. The alleged new evidence provides no reason for the Outagamie County Court to collaterally review the Milwaukee County court's subject matter jurisdiction.

Second, Heimermann was no longer incarcerated in Outagamie County at the time he filed the motion for relief from the judgment. Even if the trial court had granted the motion to reopen the habeas proceeding, it would lack competency to hear a petition for a writ of

habeas corpus for a prisoner who was not convicted and is not detained in its jurisdiction. WIS. STAT. § 782.03; ***State v. Schroeder***, 224 Wis. 2d 706, 712, 593 N.W.2d 76 (Ct. App. 1999).

Third, the motion was not filed within a reasonable time as required by WIS. STAT. § 806.07(2). The four-year delay in seeking to reopen the habeas judgment is not reasonable, particularly when the place of incarceration has changed in the interim. Heimermann offers no intelligible explanation for his failure to seek relief at an earlier date. Heimermann correctly notes that the "reasonable time" restriction does not apply to a motion to reopen a void judgment. *See* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 134, 273 Wis. 2d 76, 681 N.W.2d 190. He has not established that the 1999 judgment denying habeas corpus relief was "void." Heimermann's arguments regarding void judgments refer to the Milwaukee County judgments of conviction, not the Outagamie County judgment denying habeas corpus relief. Therefore, Heimermann was required to file the motion within a reasonable time and he failed to do so.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN OUTAGAMIE COUNTY
CIRCUIT COURT
BRANCH III

STATE EX REL SCOTT A. HEIMERMANN,

Plaintiff

ORDER DENYING REQUEST FOR RECONSIDERATION

FILE NUMBER 99 CV 72

BRAD GEHRING, et al

Defendant

TO: Clerk of Courts
Mr. Scott A. Heimermann
Assistant Attorney General Robert M. Hunter

Mr. Heimermann's petition asks this Court to reconsider its denial of the Writ for Habeas Corpus following the hearing on February 12, 1999. It has been almost five years since that hearing. Rather than this Court reconsidering its denial, based on the information then produced, Mr. Heimermann should consider filing a new petition based on information that may be presently available. Circumstances have changed considerably since February, 1999. To this Court's knowledge, it has been years since Mr. Heimermann has had anything to do with Outagamie County or the Outagamie County Court System, other than correspondence related to this case. The only connection with this case and Mr. Heimermann, was a relatively brief time that he was serving in the Outagamie County Jail as a State inmate.

This Court makes no comment on the relative merits of the information he asserts in his recent filings. However, if Mr. Heimermann believes that they form the basis for some relief, then this should be pursued as a new petition, motion, or whatever other means of relief he feels he is entitled to. While Section 806.07, Stats., may not be controlling, it is clear that even under the dictates of that Statute this request would be years past the time for consideration by this Court.

Dated at Appleton, Wisconsin this 8th day of January, 2004.

BY THE COURT:

/s/ Joseph M. Troy
Judge Joseph M. Troy

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March 8, 2005

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Warren D. Weinstein
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You are hereby notified that the Court has entered the following order:

No. 04-0414 State ex rel. Heimermann v. Gehring
L.C.#99CV72

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of petitioner-appellant-petitioner, State of Wisconsin ex rel. Scott A. Heimermann, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Cornelia G. Clark
Clerk of Supreme Court

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DISTRICT I

October 19, 2004

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You are hereby notified that the Court has entered the following opinion and order:

03-3213 State of Wisconsin v. Scott A. Heimermann
(L.C. #91CF911492)

Before Wedemeyer, P.J., Fine and Curley, B.

Scott Heimermann appeals from a circuit court order denying his postconviction motion. Based upon our review of the briefs and record, we conclude that this appeal is appropriate for summary disposition pursuant to WIS. STAT. RULE 809.21(1) (2001-02).[1] We affirm the order.

Heimermann was convicted of two counts of first-degree intentional homicide, party to a crime, in 1992. We affirmed the judgment and an order denying his postconviction motion in his direct appeal, ***State v. Heimermann***, No. 95-0225-CR, unpublished slip op. (Wis. Ct. App. Aug. 8, 1995). Since then, Heimermann has filed approximately nineteen postconviction motions. The postconviction motion underlying this appeal alleges that the circuit court lacked subject matter jurisdiction over the original criminal case and personal jurisdiction over him.

The motion on review was filed pursuant to WIS. STAT. § 974.06(1).[2] Section 974.06(4) provides:

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[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Wisconsin Stat. § 974.06(1) provides:

> After the time for appeal or postconviction remedy provided in s. 974.02 has expired, a prisoner in custody under sentence of a court or a person convicted and placed with a volunteers in probation program under s. 973.11 claiming the right to be released upon the ground that the sentence was imposed in violation of the U.S. constitution or the constitution or laws of this state, that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

> All grounds for relief available to a person under this section must be raised in his or her original, supplemental or amended motion. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the person has taken to secure relief may not be the basis for a subsequent motion, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended motion.

The supreme court held that the primary purpose of subsection (4) "was to compel a prisoner to raise all grounds regarding postconviction relief in his or her original, supplemental or amended motion, thereby cutting off successive frivolous motions." ***State v. Escalona-Naranjo,*** 185 Wis. 2d 168, 177, 517 N.W.2d 157 (1994) (footnote omitted). The supreme court noted that "if the defendant's grounds for relief have been finally adjudicated, waived or not raised in a prior postconviction motion, they may not become the basis for a § 974.06 motion." ***Escalona-Naranjo***, 185 Wis. 2d at 181. Recently, ***Escalona's*** holding was reaffirmed in ***State v. Lo***, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756:

> Consequently, we reaffirm our holding in ***Escalona*** that all claims of error that a criminal defendant can bring should be consolidated into one motion *or* appeal, and claims that could have been raised on direct appeal or in a previous § 974.06 motion are barred from being raised in a subsequent § 974.06 postconviction motion absent a showing of a sufficient reason for why the claims were not raised on direct appeal or in a

previous § 974.06 motion (citation and footnote omitted).

Heimermann's motion does not allege or otherwise *establish a sufficient* reason for not raising in his direct appeal or earlier postconviction motions the instant claims that the circuit court lacked subject matter and personal jurisdiction. Under ***Escalona***, he is barred from raising them now.

Upon the foregoing reasons,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN MILWAUKEE COUNTY
CIRCUIT COURT
Branch 42

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. F-911492

SCOTT A. HEIMERMANN,

Defendant.

**DECISION AND ORDER
DENYING MOTION TO REOPEN JUDGMENT
FOR PURPOSES OF DISMISSING
"WITH PREJUDICE"**

(Filed Aug. 25, 2003)

On August 20, 2003, the defendant filed a *pro se* motion for postconviction relief contending that the above case should have been dismissed with prejudice and that its dismissal without prejudice was the result of "outrageous government conduct," i.e. "recklessly false statements" against him. The motion was originally filed with then Chief Judge Michael Skwierawski, who forwarded it to the Hon. Victor Manian as Presiding Judge in the Felony Division for assignment to a felony judge. As this court was previously assigned to Heimermann's case in F-911618, it was also assigned to review the pending motion.

The motion is unequivocally a collateral attack on the defendant's conviction in F-911618. In essence, he claims that had the charges issued against him in F-911492 been dismissed with prejudice, charges could not have issued in

F-911618 and he would not stand convicted now. The court rejects these contentions. He is precluded from revisiting the charging procedures utilized at the time. Moreover, a conviction resulting from a fair and errorless trial cures any error during a prior proceeding. *State v. Webb*, 160 Wis.2d 622, 627 (1991). The defendant's self-serving claims are insufficient for purposes of reopening a disposition which occurred more than ten years ago.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion to reopen the judgment is **DENIED**.

Dated this 25 day of August, 2003, at Milwaukee, Wisconsin.

BY THE COURT:

DAVID A. HANSHER
David A. Hansher
Circuit Court Judge

OFFICE OF THE CLERK
Supreme Court of Wisconsin
110 EAST MAIN STREET, SUITE 215

[SEAL]

P.O. BOX 1688
MADISON, WI 53701-1688

TELEPHONE (608) 266-1880
FACSIMILE (608) 267-0640
Web Site: www.wicourts.gov

January 11, 2005

To:

Hon. David A. Hansher
Milwaukee County
Circuit Court
901 N. Ninth Street
Milwaukee, WI 53233

John Barrett
Milwaukee County
Clerk of Courts
Criminal Appeals
Processing
821 W. State Street,
Rm. 114
Milwaukee, WI 53233

Robert D. Donohoo
Deputy District Attorney
821 W. State St., Rm. 412
Milwaukee, WI 53233

Scott A. Heimermann 159200
Waupun Correctional Institution
P.O. Box 351
Waupun, WI 53963-0351

Warren D. Weinstein
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

You are hereby notified that the Court has entered the following order:

No. 03-3213 State v. Heimermann L.C. #91CF911492

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Scott A. Heimermann, and a supplement to that petition also having been filed, and a motion to reinstate defendant-appellant-petitioner's application for release on bail pending appeal also having been filed, and the petition, supplement and motion having been considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

IT IS FURTHER ORDERED the motion is likewise denied.

Cornelia G. Clark
Clerk of Supreme Court

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted January 10, 2003
Decided February 4, 2003

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-4033

SCOTT A. HEIMERMANN,
Applicant,

v.

GARY McCAUGHTRY,
Respondent.

On Response to
Show Cause Order

ORDER

Scott Heimermann has responded to this court's December 13, 2002 order instructing him to show cause why we should not sanction him for repeated frivolous filings attacking his Wisconsin murder conviction. Only one argument in his thirty-page brief bears minimal discussion. Heimermann's case is obviously distinct from *In re Byrd,* 269 F.3d 8585 (6th Cir. 2001). Heimermann's proposed claim does not rely on evidence even remotely as damaging to his conviction as someone else's confession and, as opposed to Byrd, he did file a petition for rehearing, which, as he himself recognized in that petition, is expressly prohibited by § 2244(b)(3)(E). These overriding distinctions establish that Heimermann's reconsideration

motion was blatantly frivolous and not brought in good faith.

Accordingly, we impose the following SANCTION. We fine Heimermann $5,000 and, until he pays the fine, any papers submitted on his behalf will be returned unfiled with the exception of criminal cases and habeas corpus petitions not challenging his 1991 Wisconsin murder conviction.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted December 6, 2002
Decided December 13, 2002

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-4033

SCOTT A. HEIMERMANN,
Applicant,

v.

GARY R. McCAUGHTRY,
Respondent.

On Motion for Reconsideration

ORDER

Scott Heimermann filed a document entitled "Motion directed to the en banc court to stay enforcement of the panel's order entered on November 26, 2002, and motion directed to en banc court for leave to file a motion requesting referral of case to a special master for factual hearing," which we construe as a motion for reconsideration of this court's order denying his application for leave to file a successive collateral attack. The motion does nothing other than seek relief on the ground that we reached the wrong result. But, as Heimermann explicitly recognizes, 28 U.S.C. § 2244(b)(3)(E) provides that "the grant or denial of an authorization by the court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of

certiorari." Accordingly, this court is not authorized to consider Heimermann's motion, which shall be filed without further action by the court.

In our November 26 order we warned Heimermann that he would again be sanctioned if he continued his course of frivolous litigation. He did not heed our warning and we now order Heimermann to SHOW CAUSE why the court should

* * *

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted November 19, 2002
Decided November 26, 2002

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 02-4033

SCOTT A. HEIMERMANN, *Applicant*, *v.* GARY R. McCAUGHTRY, *Respondent.*	On Motion for an Order Authorizing the District Court to Entertain a Second or Successive Petition for Collateral Review

ORDER

Scott Heimermann has filed his eighth application pursuant to 28 U.S.C. § 2244(b)(3), seeking authorization to file a second or successive petition for a writ of habeas corpus under 28 U.S.C. § 2254. Until recently Heimermann was subject to a 1997 *Alexander* bar for repeatedly filing frivolous applications. Giving Heimermann the benefit of the doubt, we resolve his present application, but WARN him that sanctions can again be imposed for future frivolous filings.

Heimermann proposes a collateral attacked based on newly discovered evidence of his innocence. His submissions, however, do not even remotely suggest his innocence; rather, they obliquely imply police misconduct

regarding promises made to a confidential informant, who happened also to be one of Heimermann's codefendants. Even the CI's affidavit does not explicitly repudiate his testimony that he saw Heimermann standing over his victims holding a gun almost immediately after they were shot. Accordingly, we DENY Heimermann's application for permission to file a second collateral attack.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

GORDON A. ABRAHAMSON,

Respondent.

Case No. 95-C-1101 (JPS)

DECISION AND ORDER

(Filed Jan. 5, 1996)

APPEARANCES:

For Petitioner:

Scott A. Heimermann
Dodge Correctional Institution
P.O. Box 700
Waupun, WI 53963-0700
Telephone: 414-324-5577, Ext. 6233

For Respondent:

James E. Doyle
Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857
Telephone: 608-266-1221

On October 30, 1995, Scott A. Heimermann filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus. Heimermann, who was convicted of two counts of first degree intentional homicide, is currently incarcerated at Dodge Correctional Institution in Waupun, Wisconsin. The court considers the petition under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts.

DISCUSSION

The writ of habeas corpus is only available to a person who is "in custody pursuant to the judgment of a State court . . . in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254. Rule 4 provides:

> If it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified. Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. "Rule 4 enables the district court to dismiss a petition summarily, without reviewing the record at all, if it determines that the petition and any attached exhibits either fail to state a claim or are factually frivolous." *Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993).

One prerequisite to habeas relief is that the petitioner generally must provide the state courts "a full and fair opportunity to review the petitioner's claims through its own judicial processes before asserting federal review." *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir.), *cert. denied*, 502 U.S. 944 (1991) (citations omitted). This involves "two inquiries – whether the petitioner exhausted all available state remedies and whether the petitioner raised all his claims during the course of the state proceedings." *Henderson v. Thieret*, 859 F.2d 492 (7th Cir. 1988), *cert. denied*, 490 U.S. 1009 (1989). "If the answer to either of

these inquiries is 'no,' the petition is barred for a failure to exhaust state remedies or for a procedural default." *Id.*

Heimermann raises eight grounds for relief. He states in his petition that he did not raise three of them either on direct appeal or in post-conviction proceedings. "Before bringing his claims in a federal habeas proceeding, a prisoner must first raise his claims during the course of the state proceedings in order to avoid procedural default." *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 28 (1994). A petitioner who fails to "fairly present" his federal claims to the state courts has procedurally defaulted those claims unless he can show cause and prejudice. *Id.*

As to the three claims Heimermann admittedly did not raise in state courts, he cannot show cause. He argues that the state interfered with his right to effective assistance of counsel by refusing to appoint an attorney to represent him. The attached exhibits show that the state refused to appoint a second appellate counsel for Heimermann after he dismissed the first appointed counsel, even though he was warned that a second would not be appointed for him. The fact that Heimermann later was granted a voluntary dismissal of his direct appeal so that he could pursue post-conviction relief did not entitle him to appointed counsel when his direct appeal was reinstated. Having voluntarily dismissed his appointed appellate counsel knowing that the state would not appoint another, Heimermann cannot complain now of a deprivation of his constitutional rights. For these reasons, the record shows that the state fulfilled its obligation to provide appellate counsel for Heimermann. Thus, the state did not deprive Heimermann of effective assistance of

counsel, and he has procedurally defaulted the claims not presented to the state courts.

Heimermann also raises five grounds that he claims to have presented to the state courts. At this point, the court assumes Heimermann has exhausted his state remedies and adequately presented these issues to the state courts.

1. Failure to Appoint Counsel on Reinstated Direct Appeal

The first ground restates his procedural default "cause" argument, i.e. that the state deprived him of effective assistance of appellate counsel by not appointing successor counsel. As explained above, this contention is without merit.

2. Appellate Delay

The second ground is that the four year delay in his appellate proceedings was attributable to the state and was unduly long so as to violate Heimermann's rights to due process. The Seventh Circuit has not defined precisely if or when an appellate delay denies due process of law. In the speedy trial context, the four factors of *Barker v. Wingo*, 407 U.S. 514 (1972), would apply: (1) the length of delay; (2) the reason the government gives for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant. *U.S. v. Kimmons*, 917 F.2d 1011, 1015 (7th Cir. 1990) (citing *Barker*, 407 U.S. at 531-32). In the context of determining whether the delayed availability of a transcript for appellate review was a deprivation of due process, the Seventh Circuit has focused on the prejudice factor. "[P]rejudice occurs only

when the unavailability of a transcript prevents the appellate court from determining whether there is reversible error, and ... 'lack of a transcript does not necessarily mean that review is impossible.'" *Kimmons*, 917 F.2d at 1014 (quoting *U.S. v. Nolan*, 910 F.2d 1553, 1560). The court also noted that the delay involved was relatively minor. *Id.*

Here, Heimermann has not contended, and it does not appear from the record, that he will be prejudiced by inadequate review. All he offers is speculations that necessary witnesses will be unavailable or that their memories will be lost. Such speculations are insufficient to allow such a claim to continue.

The record indicates that Heimermann himself has been responsible for some of the delay. He dismissed his appointed counsel, prepared a *pro se* appellate brief, and spent time attempting to obtain successor appointed counsel after he was warned this would be fruitless. The Wisconsin Court of Appeals indicates that Heimermann did not file a motion for a new trial until November 1992. *State v. Heimermann*, 539 N.W.2d 337, 1995 WL 465150, **2 (Wis. App. 1995). Moreover, the time period Heimermann complains of includes both proceedings for post-conviction relief and for direct appeal. From November 1992 until October 1995, when he filed this habeas petition, spans only three years. In these circumstances, there has been no undue delay and no prejudice, so it is unnecessary to apply the other *Barker* factors. *Kimmons*, 917 F.2d at 1015. For these reasons, this claim must be dismissed.

3. Evidentiary Rulings

The third ground for relief presented is that the trial court allowed the prosecution to use Heimermann's conduct before, during, and after the murder to show his state of mind, but it did not allow Heimermann to present evidence on this issue or to cross-examine the witnesses.[1] "On a petition for writ of habeas corpus, a federal court will not review evidentiary questions unless 'there is a resultant denial of fundamental fairness or the denial of a specific constitutional right.'" *Stomner v. Kolb*, 903 F.2d 1123, 1128 (7th Cir.) (quoting *U.S. ex rel. DiGiacomo v. Franzen*, 680 F.2d 515, 517 (7th Cir. 1982)), *cert denied*, 498 U.S. 924 (1990). "In determining whether the exclusion of evidence violated an accused's constitutional rights, we must examine whether the proffered evidence was relevant, material, and vital to the defense, and whether the exclusion of that evidence was arbitrary." *Lilly v. Gilmore*, 988 F.2d 783, 789 (7th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 154 (1993). "Error in the exclusion of evidence reaches constitutional magnitude if the excluded evidence creates a reasonable doubt that did not otherwise exist." *Id.* (citing *U.S. v. Agurs*, 427 U.S. 97 (1976)). The standard in determining whether the admission of evidence is constitutional error is "whether the probative value of the state's evidence was so greatly outweighed by its prejudice to [the defendant] that its admission denied him a fundamentally fair trial." *Milone v. Camp*, 22 F.3d 693, 702 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 720 (1995).

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[1] Heimermann indicates in his brief, filed December 11, 1995, that he has dropped his claim as to the jury instruction.

In this case, Heimermann refers to the following evidence: (1) the attempted cross-examination of state witnesses Isajiw and Danbrova as to Piscitello's connections to organized crime; and (2) excluded testimony by four witnesses relating to the coercion/duress defense and to Piscitello's ties with the Mafia. The trial court excluded testimony as to Piscitello's character and associations because the defense presented no credible evidence that Heimermann was coerced into action on the night of the murders. Thus, the testimony was not relevant. *Heimermann*, 1995 WL 46150, **4.

Here, Heimermann has failed to state a claim concerning the exclusion of evidence. The trial court determined that there was no evidence or allegation that Heimermann was coerced the night of the murder, so the proffered testimony was not relevant under Wisconsin law.[2] Under these criteria, the trial court did not act arbitrarily. Finally, the evidence was not vital to the defense. If the only evidence of coercion or duress was that a particular person might theoretically be capable of it, such evidence would be so weak and unpersuasive that it could not be vital to the defense. Thus, exclusion of this evidence could not have offended due process.

To show that the admission of evidence of Heimermann's conduct was an error of constitutional magnitude, Heimermann must demonstrate that probative value of the evidence was greatly outweighed by the prejudice it

---

[2] Section 904.01, Wis. Stats.: Definition of "relevant evidence." "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

caused. Heimermann does not indicate to which evidence he is referring. The only evidence referred to in his brief that deals with his conduct before, during, and after the murder seems to be about the pawning of jewelry. The claim then appears to be that the signatures of someone purporting to be Heimermann, signed on pawn cards before and after the murder, are different. The signature of someone claiming to be Heimermann on a pawn card for jewelry belonging to a murder victim is relevant and probative. While there is more than one inference that may be drawn from the facts, there is no suggestion or likelihood that this evidence's probative value was greatly outweighed by its prejudice.

4. Ineffectiveness of Trial Counsel

To show ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), the petitioner must show that counsel's performance was deficient as measured by an objective standard of reasonable effectiveness and that he was prejudiced as a result. *Id.* at 687-88, 692. "A habeas petitioner satisfies the performance prong by identifying specific acts or omissions that fell outside the wide range of professionally competent assistance. . . . " *Lilly*, 988 F.2d at 785.

In analyzing counsel's performance, the court must ask "whether, under all the circumstances and under scrutiny highly deferential to counsel, the challenged actions 'were outside the wide range of professionally competent assistance.'" *Id.* at 786 (quoting *Strickland*, 466 U.S. at 689-690). A defendant may not challenge the strategic or tactical decision of counsel. *U.S. v. Otero*, 848 F.2d 835, 838 (7th Cir. 1988). In order to show prejudice,

the defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Heimermann makes three claims under this heading. First, he claims that defense counsel failed to consult with him about the submission of a coercion/duress jury instruction and to request such an instruction. The record does not support this claim. At a hearing held by the trial court during post-conviction proceedings, Heimermann testified that he was not coerced into making the phone call that lured the victims to the murder site or into leading the victims into the basement. *Heimermann*, 1995 WL 46150, **2. He also admitted he agreed to an all or nothing strategy for his defense. *Id.* This refutes his claim in this petition that he was denied the opportunity to consult about such a defense or to present it. For this reason, trial counsel's performance was not deficient.

Second, Heimermann claims it was ineffective assistance of counsel to not investigate law enforcement agencies' relationship with Piscitello and their knowledge about the murder. This claim is factually fanciful. Heimermann recites a long list of assertions about what law enforcement agencies knew of the circumstances surrounding the murders. These are conclusory, fanciful, and even if true, would do little or nothing to undermine confidence in the result of Heimermann's trial. Thus, the record does not indicate trial counsel's performance was deficient, or that there was any prejudice.

Finally, Heimermann contends that trial counsel's failure to attempt to discredit the signature on the pawn card for the victim's jewelry was ineffective assistance of

counsel. As stated above, Mr. Heimermann has stated that he agreed to an all or nothing defense, so he cannot complain now of counsel's decision to forego a defense that Heimermann was "framed." However, from the limited record available, it appears that co-defendant Isajiw's testimony was crucial to Heimermann's conviction, but the significance of Heimermann's post-murder conduct is unclear.

Heimermann claims that he suffered prejudice. He states that this issue "went directly to the heart of [his] innocence and defense" and that "a majority of the prosecutions [sic] evidence and closing argument rested upon Mr. Heimermann's alleged post-muder [sic] actions." Based on the record, I cannot conclude Heimermann suffered no prejudice.

For these reasons, Heimermann appears to have stated a claim of ineffective assistance in the failure to discredit the pawn transactions. I also note parenthetically, that the Court of Appeals did not address this contention, so it remains possible that Heimermann did not present this claim to a state forum for review.

5. Newly Discovered Evidence ("Actual Innocence")

A claim of actual innocence is not generally cognizable in determining whether the writ of habeas corpus should be granted. *Milone v. Camp*, 22 F.3d 693, 699 (7th Cir. 1994). "The conviction of an innocent person is an injustice, but it is only when such a conviction results from a legal error that the courts speak of a 'miscarriage of justice' that warrants a new trial." *Guinan v. U.S.*, 6 F.3d 468, 470 (7th Cir. 1993) (cite omitted). Even then, unless

the error is of constitutional magnitude, a federal court does not have the power to correct it in a proceeding brought under the habeas corpus statute (section 2254). *Id.* at 471.

Here, Heimermann alleges that the evidence showing his innocence did not arise until after his conviction. Thus, there could have been no miscarriage of justice at his trial. When the Court of Appeals considered this claim, it applied the rule of *Zillmer v. State*, 39 Wis. 2d 607, 159 N.W.2d 669 (Wis. 1968), that "affidavits admitting perjury, standing alone, are not sufficient to support a request for a new trial." *Heimermann*, 1995 WL 465150, **4. The appellate court determined that Heimermann had not introduced any evidence to corroborate the facts in the affidavits. Because there was no other evidence to support the affidavits and because the affidavits only recited that the witness allegedly said he had lied at trial, there is no constitutional error here. The state was under no obligation to provide a new trial on the basis of evidence it legitimately found unreliable. Accordingly,

IT IS ORDERED that petitioner's petition be and the same is hereby **GRANTED** as to the claim of ineffective assistance of counsel in the matter of the pawning of the victim's jewelry after the murder;

IT IS FURTHER ORDERED that petitioner's petition be and the same is hereby **DENIED** in part as to all other claims.

Pursuant to Rule 4(c)(2) of the Federal Rules of Civil Procedure and Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, a copy of the petition and any order shall be served by certified mail on the respondent and the attorney general of the State of

Wisconsin. The State of Wisconsin is hereby ordered to file an answer, supported by all relevant briefs, transcripts, and court opinions from direct appeal or post-conviction proceedings, on or before February 15, 1996, on the issue of whether the petitioner has either failed to exhaust or procedurally defaulted his remaining claim.

Dated at Milwaukee, Wisconsin this 5th day of January, 1996.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmueller
Chief Judge

[LOGO]
JIM DOYLE
GOVERNOR
STATE OF WISCONSIN

May 4, 2004

Mr. Scott Heimermann #159200
Waupun Correctional Institution
200 South Madison Street
PO Box 0351
Waupun, WI 53963

Dear Mr. Heimermann:

After careful consideration, the Chairman of the Pardon Advisory Board has decided to deny your recent Eligibility Rule Waiver Request. Each year the Governor's Pardon Advisory Board receives hundreds of applications for Eligibility Rule Waivers. The Chairman looks through the applications looking for an extraordinary circumstance that could set an applicant apart from others. As you know, waivers to the eligibility rules are only granted to a very small percentage of applicants. However, being denied a waiver now does not necessarily mean a denial in the future. You may re-apply for a waiver **18 months** after the date of this letter.

Sincerely,

/s/ Katie Christianson

Katie Christianson
Assistant to the Governor's Pardon Advisory Board

STATE OF WISCONSIN
OFFICE OF THE GOVERNOR

February 18, 2002

Mr. Scott Heimermann
2925 Columbia Dr.
P.O. Box 0950
Portage, WI 53901

Dear Mr. Heimermann:

After careful consideration, the Chairman of the Pardon Advisory Board has decided to deny your recent Eligibility Rule Waiver Request. You may, however, re-apply for a Waiver 18 months after the date of this letter.

If you have any questions, please feel free to contact me at 608/266-7602.

Sincerely,

/s/ Steven D. Hamilton
Steven D. Hamilton
Secretary, Governor's Pardon Advisory Board

DEPARTMENT OF CORRECTIONS **WISCONSIN**
Division of Adult Institutions Administrative Code
DOC-222 (Rev. 01/90) Chapter HSS 302

EDUCATION/CAREER ASSESSMENT REPORT

INMATE NAME	DATE OF BIRTH (M/D/Y)	INMATE NUMBER	DATE COMPLETED
HEIMERMANN, Scott	09/23/60	159200	03/13/92

TESTS ADMINISTERED
☒ Intake Battery ☐ Other – Specify:

EVALUATION (1 – Test Results; 2 – Education including experience, special problems & planning recommendations; and 3 – Vocational including employment experience, training, special problems & planning recommendations)

ABLE – 3: Reading – PHS; – Mathematics – 12.1

A PSI dated 1/2/92 was available at the time of this report.

EDUCATION

EXPERIENCE: Scott last attended the twelfth grade at Chilton (WI) Public High School in 1979. He obtained his GED in 1985 through FVTI – Appleton.

NEEDS ASSESSMENT/PLANNING: The recommended education need level is no significant need based on Scott's GED.

VOCATIONAL

EXPERIENCE: Scott has an enviable work record. From 1984 until the present time, he was self-employed in the real estate business. His PSI reports he considers himself

to be an entrepreneur. He claims to have earned $129,000 in 1986 alone. Prior to 1984, he was stably employed as truck driver, dairy farmer, factory worker or in construction.

TRAINING: Scott has taken banking and real estate classes through FVTI – Appleton. He was a licensed real estate broker until 1987, and he can type and operate some computers.

NEEDS ASSESSMENT/PLANNING: The recommended vocational need level is no significant need based on Scott's work history. He has always had stable income, and his legitimate claimed income was always satisfactory. Scott reports that while institutionalized, he would like to keep busy with any work assignments available.

PRIMARY WORK SKILL: Clerical.

Mark Cody/mrb

[LOGO] **Wisconsin Department of Financial Institutions**
Strengthening Wisconsin's Financial Future

Home > Corporations Home Page > CRIS

CRIS Record Search

Addresses **Report History** **Old Names** **Chronology**

H.A.S. INVESTMENTS, INC.
ID: H023055
Effective Date: 10/29/1986
Record Type: Domestic Business
Status: Administratively Dissolved
Status Date: 05/16/1996
Period Of Existence: PER

Registered Agent Office
Registered Agent: SCOTT A. HEIMERMANN
Registered Office Address:
500 WEST BRADLEY ROAD
FOX POINT, WI 53217

Mr. Scott A. Heimermann
P. O. Box 661
Waupun, Wisconsin 53963

November 13, 1998

"Acquitting the guilty and condemning the innocent – the Lord detests them both." Proverbs, 17:15.

I have had you on my mind all of these years. I know you have held so much bitterness towards me as well at one time I towards you. However, it's been the Lord who has enabled me to put it all behind, and with this written exchange of my words I hope too. Scott do you have an attorney working on your case? If so please make his or her name available to me. I will make a statement on your behalf. This statement will help you dearly in court. Many things were done wrong against you and me in court by the Milwaukee District Attorney's office that I plan to expose. When this is done it will show you should not be in prison with all that time.

Scott have someone contact me by written correspondence at the address shown.

Edward J. Piscitello
c/o Rev. Richard Tenaglia
P. O. Box 2290
Waukesha, Wisconsin
53187

Write me and share what is needed for you in court. Also, I will write sharing my concerns as well. Be truthfully with me. Remember I put you in prison with what was called the perfect crime. Therefore, I can get you out as well!!

Bless you
In His Peace
[Illegible] Edward Piscitello

Have you heard from Joseph Isajiw? If so I can't believe it. Let me know where I can send you correspondence.

STATE OF WISCONSIN MILWAUKEE COUNTY CIRCUIT COURT BRANCH 33

State of Wisconsin,

Plaintiff

-VS- Case No. F-911618

Scott A. Heimermann,

Defendant

AFFIDAVIT OF EDWARD J. PISCITELLO

STATE OF FLORIDA)
) SS.
COUNTY OF MARTIN)

Edward Joseph Piscitello, under Oath, deposes and says:

1. I am currently a resident in the State of Florida Department of Corrections system via Inter-State transfer from Wisconsin Department of Correction system on April 3, 1996.

2. My actual whereabouts cannot be disclosed due to the fact that I am classified as a "protection case" arising out of concerns for my personal safety with respect to past and present capacities as an active Government confidential informant.

3. I testify that I have personal knowledge of the information contained in this affidavit. I give this affidavit for the purposes of Scott A. Heimermann's criminal conviction and relevant Court proceedings arising from that judgment of conviction.

4. I testify that I was a Co-defendant in the subject matter authorizing Mr. Heimermann's judgment of conviction in *STATE OF WISCONSIN -VS- SCOTT A. HEIMERMANN*, Milwaukee County Circuit Court Case Number F-911618. As of December 20, 1991, I stand convicted of two counts of first-degree intentional homicide, party to a crime, for the murders of Mohammad Binwalee, also known as "T.C.", and his companion, Dion Russell.

5. I testify that, since my own judgment of conviction, on December 20, 1991, I have had no communication with Mr. Heimermann, his Attorneys, Agents, Ect [sic]. It was I, a Government Confidential Informant, a key, and only, eyewitness for the Milwaukee County District Attorney's Office, where I helped make the case against Mr. Heimermann at the search and arrest warrant proceedings, and then at his trial. It is through my converged Religious beliefs in God, where I swear under Oath that the proceedings in this matter, from start to finish, were nothing more than a planned illegality on behalf of the Milwaukee County District Attorney's Office and progeny.

6. On March 7, 1991, I reported the murders in this case, the location of the bodies, and the vivid facts of the crime. It was at this point, where I asked for a "nonprosecution agreement" where Milwaukee Senior Deputy District Attorney, Robert Donohoo, and other Milwaukee Officials granted my request and agreed not to prosecute me for my own role in the earlier, August 19, 1989 murders. In return, I agreed to testify live for Donohoo at the March 8, 1991, search warrant proceedings where I was Donohoo's chief eyewitness. I was never taken into custody, and neither my person nor my residence was ever searched. After I testified at the March 8, 1991, search

warrant proceedings, I was administered a Polygraph examination where it was determined by a Polygraphist from the Milwaukee County D.A.'s Office that my information provided up to this point was truthful. Then, due to concerns for my personal safety, i was placed in "witness protection" and flown to the State of Arizona. Later, on April 15, 1991, a Milwaukee Magistrate issued arrest warrants in this matter based solely on the information which I had provided at th [sic] earlier March 8, 1991, search warrant proceedings.

7. I testify that, on March 7, 1991, the information which I had provided "Donohoo and company" was that prior and up to the time of the two male victims' death (August 19, 1989), Milwaukee Police Detective Thomas Gorecki, who at that time was assigned to the Federal Drug Enforcement Administration ("DEA"), and Milwaukee Police Detective Barry Debraska Jr. were lead Officers in a drug investigation against "T.C." and other members of the "Gangster Deciples" street Gang for drug trafficking offenses including murder in the Geographical area of Chicago and Milwaukee. I was the Government Confidential Informant for these Police Officers where I provided insight and assistance as to how to investigate certain matters with respect to this street Gang and its memebrs [sic]. Due to my assistance, several of "T.C.'s" Gang affiliates were ultimately prosecuted and convicted for various drug trafficking activity. At the time of his death on August 19, 1989, "T.C." had become a Federal Bureau of Investigation ("FBI") top ten fugitive wanted by the FBI for a Chicago Gangland murder of David Curry on July 3, 1988.

8. I testify that on March 7, 1991, I told Donohoo and company that I, as well as, Joseph Isajiw and others were

actual actors in the murders. At no time did I ever name Scott A. Heimermann as an actual actor in the murders. While I named Mr. Heimermann as being present during the crime, I also told Donohoo and company that Mr. Heimermann had obtained a signed offer-to-purchase the residence of 941 South 35th Street from my parents who were Executors of my Aunt's Estate of which the residence had belonged to. I told Donohoo and company that the actual murder plan was never discussed in Mr. Heimermann's presence. I told Donohoo and company that the actual murder plan was discussed between others and myself and; later, the actual murder plan was discussed between Joseph Isajiw. I told Donohoo and company that the actual murder plan as discussed between Mr. Isajiw and myself was discussed at a Restaurant on the day of the murders (George Webb's Restaurant at the corner of South 35th Street and National Avenue in Milwaukee). I told Donohoo and company that at no time was Mr. Heimermann actually aware of the murder plan nor could he have been actually aware of the same. Indeed, Mr. Heimermann was at the residence (941 South 35th Street) sleeping during the time Mr. Isajiw and myself later discussed the vivid details of the actual murder plan. In short, Donohoo and company was fully informed by me that Mr. Heimermann neither instigated nor encouraged Mr. Isajiw, others or myself to act in the murders. In addition, Donohoo and company was fully informed by me that Mr. Heimermann was never mutually aware of what Mr. Isajiw, others or myself were about to do to "T.C." and his companion, Dion Russell, nor did Mr. Heimermann participate in the commission of these murders. Finally, while I informed Donohoo and company that Mr. Heimermann had pawned the personal jewelry from the two male victims, I also informed Donohoo and company that Mr.

Heimermann did not personally take the jewelry from the victims. It was your affiant who was the individual who had taken the jewelry from the two male victims, and later, it was at my behest where Mr. Heimermann had pawned the jewelry ***for*** me. Mr. Heimermann was never privy to the jewelry which he had pawned was actually that of the two male victims until, ***after the fact.*** The purpose of effectuating the pawning of the victims' jewelry in Mr. Heimermann's name was in order to preclude him from ever reporting the 1989 murders to the Police. Donohoo and company were aware of these facts.

9. I further testify that, I informed Donohoo and company that, during the time Mr. Isajiw and your affiant were discussing the actual murder plan at the George Webb's restaurant, Mr. Isajiw had made a telephone call from the restaurant to his brother Nicholas Isajiw in Chilton Wisconsin. I informed Donohoo and company that I over heard Mr. Isajiw say to his brother Nicholas that he [Joe] would not be back to Chilton [Isajiw's home town], until later sometime Sunday; i.e. August 20, 1989. I heard Mr. Isajiw say the reasons for his delayed arrival back to Chilton were because he [Joe] and your affiant were "going to kill that nigger" ["T.C."], due to T.C. ripping him [Joe] off on several cocaine purchases. I further informed Donohoo and company that immediately after the murders that I witnessed Mr. Isajiw again telephone his brother Nicholas, in Chilton, from the 941 South 35th Street residence, where Joe asked his brother Nicholas about "wrapping the bodies". I further informed Donohoo and company that the weapons used in the murders were supplied by Joe and his brother Nicholas.

10. I testify that consistent with the information provided to Donohoo and company in 1991, I further

confessed the facts of the murder in letters to Milwaukee A.D.A. Karen Christenson and other Government Law Enforcement Officials over the years with whom I corresponded through the Truth Bible Church in Waukesha Wisconsin. My letters described the initial actors in the murders in sufficient detail that it further exonerated Mr. Heimermann and which demonstrated Public Official Misconduct in the prosecution of the above-captioned case. I asked Ms. Christenson and other Government Law Enforcement Officials to forward the contents of the letters to the necessary Law Enforcement for prosecution, which to my knowledge they did not.

11. I also testify that, consistent with the information I provided to Donohoo and company in 1991, that Milwaukee Police Detective Barry Debraska Jr. and others from the Milwaukee Police Department were fully aware of "T.C." and his companion's death *prior* to the time these murders were brought public via the search warrant of March 8, 1991. Indeed, on the night of the murders (August 19, 1989), I personally telephoned Detective Debraska from the 941 South 35th Street Residence, and later that same night, I also telephoned Detective Debraska from "O'Connor's Pub" which is located on East Wells Street in Milwaukee, where I had advised Detective Debraska about the situation regarding the murders. Then, 19 months later (March 7, 1991), at the behest of Detective Debraska, Detective Debraska and your affiant marched into the Milwaukee Police Administration Building where we together met with Milwaukee Police Detectives Ronald Castillo and Brian O'Keefe, and confessed to these Detectives and later Donohoo the vivid details surrounding the murders. The very next day (March 8, 1991), while I testified live at the search warrant proceedings for Donohoo, the

Detectives affirmatively confirmed my story and vouched for my reliability as an long time informant for the Milwaukee Police drug Unit.

12. In this truthful affidavit I testify that as a key, and only, Government Confidential Informant in the March 8, 1991 search warrant proceedings, and the conviction of Mr. Heimermann, that Donohoo and company would compel your affiant to experience chagrin by breaching the "nonprosecution agreement" – and where your affiant was placed in the position to assist in bringing to light the earlier 1989 murders via live testimony at the March 8, 1991, search warrant proceedings – all as an exploitation of a planned illegality – in order for no other reason than to "cover" for Detective Debraska and other Milwaukee Officials' knowledge and liability in the murders. For example: When the preliminary proceedings were completed in the above-entitled matter, a surprising developement [sic] occured [sic]: I, as the reliable confidential informant, was no longer credited. Joseph Isajiw had now entered the picture as the prosecution's "dispositive" evidence. Isajiw plead guilty to two counts of first-degree intentional homicide and agreed to testify for the prosecution against your affiant and Mr. Heimermann. The prosecutor decided to try me first. There, at my trial, the prosecutor Karen Christenson, put on the stand the same Milwaukee Police Detectives (Ronald Castillo, Barry Debraska Jr. and Brian O'Keefe), whom had earlier at the March 8, 1991, search warrant proceedings vouched for your affiant's reliability as an Government Confidential Informant. Thier [sic] testimony now provided evidence that I was notoriously ***untruthful*** informant, whose testimony cannot be believed. By convicting your affiant of murder as well as discrediting his own trial testimony

where I took the stand in my own defense, the prosecutor succeeded in making me a untruthful confidential informant which the Judge and Jury then ultimately agreed. Of course, the prosecutor did not stick with this version of the events to [sic] long. At Mr. Heimermann's trial the prosecutor vouched for your affiant's credibility as an informant. Now the prosecutor urged that Mr. Heimermann's jury credit my information. In short, as the key, and only, Government Confidential Informant in the case at hand, the Milwaukee County D.A.'s Offcie [sic] used your affidant [sic] as its star witness, then had him cast aside conveniently without honoring the "nonprosecution agreement" – in order for no other reason than to "whitewash" Detective Debraska Jr.'s and other Milwaukee Officials' knowledge and liability in the murders.

13. This affidavit does not exhaust my knowledge of the events to which it refers. I respectfully represent the foregoing events as trustworthy eyewitness accounts as personally observed and enunciated between the Senior Deputy District Attorney Robert Donohoo and company and myself. I am willing to make myself available to the Court in order to answer any questions with respect to Mr. Heimermann's innocence in the murders, his illegal confinement and all other instances of misconduct in office testified to herein. In other words, Mr. Heimermann should not be doing the term of his sentence.

14. I make this affidavit of my own free will and not as a result of any threats or promises and I hold that the truth be known so help me God.

/s/ Edward J. Piscitello
Edward Joseph Piscitello

Subscribed and sworn to
before me this 28 day of
~~October~~, December 1999
[Illegible]
NOTARY PUBLIC,
STATE OF FLORIDA
MY COMMISSION
EXPIRES: June 20, 2003

[Seal]

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

BRANCH 10

STATE OF WISCONSIN EX REL.,
SCOTT A. HEIMERMANN,

Petitioner

VS.

GARY R. McCAUGHTRY, Warden
Waupun Correctional Institution,

Respondent

Court File No.:
02-CV-008254

AFFIDAVIT OF EDWARD J. PISCITELLO

STATE OF WISCONSIN)
) SS.
COUNTY OF COLUMBIA)

Edward J. Piscitello, being first duly sworn, deposes and states as follows:

1. As a result of having been arrested as a party to a crime to the August 19, 1989 shootings and killings of Mohammad Binwalee and Dion Russell, I am presently housed at the Columbia Correctional Institution, 2925 Columbia Drive, Post Office Box 0900, Portage, Wisconsin 53901-0900. I am personally familiar with the contents of this affidavit.

2. It came to my attention that petitioner Scott A. Heimermann has filed a petition for writ of habeas corpus seeking his immediate release into the community in the above-referred to matter.

3. Since the late 1970s, I was an employee and agent for the City of Milwaukee Police Department in the capacity as an undercover government informant. During which time, Milwaukee police detective Glen Lewis was my law enforcement handler. In following years, our crime-fighting efforts were very successful in bringing down well organized criminals and organizations to justice for running narcotic rings in the geographical area of Milwaukee, including Tony Peters, Joey Vokes, and Balistreri family, the infamous and reputed mob family in Milwaukee.

4. At all material and relevant times hereinafter mentioned, and beginning in October 1988 and continued through at least March 1991, I was an employee and agent of the City of Milwaukee Police Department. During this time, Milwaukee police detectives Barry Debraska Jr., and Thomas Gorecki (the latter a liaison for the Milwaukee Drug Enforcement Agency), were my law enforcement handlers. In these years, our crime-fighting efforts were very successful to a certain point in bringing down criminals and organizations to justice for running narcotic rings in the (and outside) the geographical area of Milwaukee. A list of these certain people and organizations will be made at the end of this affidavit, including members of organized crime, the Outlaws Motorcycle gang and the Black Ganster [sic] Disciples and Brother of Struggle street gangs.

5. As it is, in April 1989 it had come to our attention that Scott A. Heimermann had been seen by my law enforcement handlers in that he had been associating with certain people that had become the focus of these drug activity investigations. Specifically, Mr. Heimermann had been seen dating a female by the name of Cheryl Brown.

Ms. Brown was a former girlfriend of a member of the Tony Glapa et al. narcotic group out of the south-side of Milwaukee. Detective Debraska had been investigating this group for several years without success. A report documenting these investigations, in part, can be confirmed by the documentation submitted herein by U.S. Customs Special Agent Buford E. Gates and are attached as Exhibit 1. These documents were prepared by Agent Gates in the regular course of discovery giving rise to the above-entitled action.

6. In short, Detective Debraska and Gorecki needed to get close to Mr. Brown in order to hit pay dirt on these ongoing drug activity investigations and Mr. Heimermann was our conduit for purposes of doing so.

7. At any rate, at no time did my law enforcement handlers deem Mr. Heimermann to have been involved in any criminal activity surrounding these April 1989 events. Whereupon, on one particular Saturday afternoon in April 1989, your affiant and Detectives Debraska and Gorecki were working together as partners and thereupon at the behest of my law enforcement handlers it was suggested that I initiate contact with Mr. Heimermann. That I did. I initiated contact with Mr. Heimermann at a Marquette University campus bar located at 22nd and West Wells Street in the City and County of Milwaukee. Specifically, my law enforcement handlers had obtained information that Mr. Heimermann previously had served as an undercover informant himself for the Calumet County Sheriff's Office (Chilton, Wisconsin) investigating drug activity in that geographical area. My law enforcement handlers also obtained information that Mr. Heimermann had grew up on a dairy farm outside of Chilton, Wisconsin, and in 1986 had moved to Milwaukee and endeavored to make a

success in real estate in that city. Further, my law enforcement handlers told me that Mr. Heimermann essentially went bankrupt, but was continuing to seek real estate investment opportunities on a somewhat smaller scale.

8. Because of this, on the pretext that in order to gain Mr. Heimermann's trust, I explained to Mr. Heimermann that my family had owned various real-estate properties on the east-side of Milwaukee, and I explained that my family was in the process of liquidating a two-million dollar estate. I also explained that until my family approved the resolution of liquidating their two-million dollar estate, that Mr. Heimermann could immediately close on a purchase of a property on south 35th street in Milwaukee. This property had belonged to my aunt who had passed away in February 1989. A month or so later, after going through my normal routine such as working Mr. Heimermann into these drug investigations, and showing Mr. Heimermann other various properties not as properties that my family actually owned on the east-side of Milwaukee but as a pretext that my family owned them, Mr. Heimermann believed that he was about to come out of his real estate slump, and begin making excellent money again. At this point Mr. Heimermann chose to accept my proposed arrangements, signed an offer-to-purchase real estate contract with my family to purchase that south 35th street property, and moved into that property, and became roommates with me at that property. Thereafter, my law enforcement handlers and myself used that property as a means to transact the drug transactions with respect to those ongoing drug activity investigations. These events were part of the trial court record and police reports in the matter of the *State of Wisconsin v. Scott A.*

Heimermann et al., case, Milwaukee county case No.: 91CF911492 and 91CF911618, which can serve as confirmation of the directives issued to me to recruit Mr. Heimermann as an unwary and innocent *de facto* government informant in these 1989 drug activity investigations.

9. During this time, I became a frequent companion in Mr. Heimermann's recreational circle. Mr. Heimermann eventually introduced me to Ms. Brown and other suspects that had become the focus of those 1989 drug activity investigations, including a long time acquaintance from childhood, by the name of Joseph Isajiw. Following these introduction [sic], and with Mr. Heinemann's unwary assistance, I and my law enforcement handlers arranged for several drug buys with Ms. Brown, including several of her own acquaintances from the south-side of Milwaukee, together with Joseph Isajiw and others with an another suspect that had been the focus of these drug activity investigations, by the name of Mohammad Binwalee. Mr. Binwalee had been known among my law enforcement handlers as a high-ranking member of the Black Ganster [sic] Disciples and Brothers of Struggle street gangs. Exhibit 2 shall serve, in part, as written confirmation of these drug transactions and that Mr. Binwalee and his confederates were suspects in these drug activity investigations leading up to his death on August 19, 1989 at the south 35th street residence. These documents were prepared by detectives Debraska and Gorecki in the regular course of the 1989 undercover drug activity investigations of Binwalee et al., and made part of the record in Milwaukee county case no. 91CF911492 and 91CF911618.

10. Several weeks before the double homicide occurred, I personally learned through my law enforcement handlers that Mr. Binwalee had been arrested by Milwaukee police on

a traffic violation, and later after detective Debraska learned of Mr. Binwalee's arrest, he cut a deal and let him back on the street in order for us to tail him to see what else he would be up to.

11. Following Mr. Binwalee's release from the Milwaukee County Jail, and during the normal routine such as the drug transactions with respect to these drug activity investigations, I received information that a "hit" of Mr. Binwalee was forthcoming. I learned in the regular course of these drug activity investigations that Mr. Isajiw was determined to kill Mr. Binwalee because he was "shorting" Mr. Isajiw on prior drag transactions. I rushed to report this threat to detective Debraska. Unfortuneately [sic], detective Debraska did not take this threat seriously. Just knowing that Mr. Isajiw would attempt to kill Mr. Binwalee was not good enough, according to detective Debraska. Detective Debraska concluded that Mr. Isajiw's threat's [sic] were not genuine, and that acting on them only ended up paralyzing the entire ongoing drug activity investigations. On the evening of August 19, 1989, Mr. Binwalee and his companion Dion Russell were shot to death by Joseph Isajiw at the south 35th street property.

12. That evening, I reported the full account of these shootings to detective Debraska. As a result, I assured detective Debraska that I no way whatsoever acquiescensed [sic] in the shootings with Mr. Isajiw, and I was then instructed to carry out my guise as having connections with the Outlaws Motorcycle gang and with organized crime in the Milwaukee area. Detective Debraska assured me that this incident would be reported, and then told me to "remember where the bodies were". Detective Debraska told me that Mr. Isajiw would be prosecuted in those shootings, and that the prosecution of the shootings

against Mr. Isajiw would be made by using Mr. Heimermann's testimony as part of the prosecution in order to not divulge my undercover role or the drug activity investigations themselves. The trial records and police reports in Milwaukee county case no. 91CF911492 and 91CF911618 serves [sic] as a written confirmation of the directives issued to me on August 19, 1989 by detective Debraska. There Milwaukee County District Attorney Jon N. Reddin and other Milwaukee police tried out a particular way to see if they could strike the right tune for Mr. Heimermann's cooperation in testifying against Mr. Isajiw in order to not jeopardize my role as a undercover government informant and the 1989 drug activity investigations themselves. Mr. Reddin had personally arranged for a prepaid plane ticket to Mr. Heimermann in Fort Lauderdale, Florida with a particular interest of having Mr. Heimermann fly to Milwaukee in March 1991 (after I and my law enforcement handlers had brought the said shootings to light) and to assist the Milwaukee prosecution team in bringing Mr. Isajw [sic] to justice for the murders. But Mr. Heimermann decided against it, thereby igniting controvercy [sic] about whether we had enough information to arrest and prosecute Mr. Isajiw without jeopardizing my undercover role and the drug investigations themselves. Only after Mr. Heimermann refused to fly back to Milwaukee and assist in the prosecution of Mr. Isajiw for the said murders did my law enforcement handlers conclude that I needed to rejoin in the prosecution of Mr. Isajiw. Moreover, written documentation of the aforesaid events of detective Debraska's knowledge of these murders and of the said directives with which he had issued to me on August 19, 1989 is attached as Exhibit 1. Here, in part, it confirms that detective Debraska was known amongst law enforcement offcials [sic] at the time surrounding these

August 19, 1989 shootings that his reputation as an effective law enforcement officer was fading fast as the "go-to" cop on the street, that he had a propensity to be corrupt and lie and, therefore, these murders as taking place under his watch command was the last thing that he needed to reestablish his reputation for professional advancement. Furthermore, written documentation of the aforesaid events of detective Debraska's knowledge of these murders and of the said directives with which he had issued to me on August 19, 1989 is attributed by U.S. Customs Special Agent Buford E. Gates's report and statement attached as Exhibit 1. In 1995, (four years after the said murders were brought to light by my law enforcement handlers and myself) Agent Gtaes [sic] had learned that none only than detective Debraska and his confederates of the Milwaukee Police Department had set out to *frame* Agent Gates in the knowledge of and the covering up of the murders. In other words, why would detective Debraska and his confederates be so concerned about going after Agent Gates, especially when Agent Gates had not been in [sic] involved in the 1989 drug activity investigations and that the murders had already been brought to the forefront on March 7, 1991, four years predating the occuurence [sic] of events by detective Debraska and confederates in 1995. Agent Gates's statements in his reports about detective Debraska and his confederates relates to him being able to prove that aspects of this whole incident were fabricated by detective Debraska and his confederates in the Milwaukee Police Department. It shows reasonable evidentiary value to the fact that Debraska and his confederates had a motive to falsify against Agent Gates in order to keep the spotlight on Agent Gates and far away from Debraska, the actual law enforcement officer who had actual knowledge of the

said murders and who directed that your affiant keep his mouth shut about these murders until the time was right.

13. Anyway, the August 19, 1989 shootings didn't get much attention in the following years so I decided to spark some chest thumping by telling Washington County Sheriff Office detectives Mark Jansen and Jack Theusch (the latter is currently the Sheriff of Washington county), including Special Agent Michael Spang of the Milwaukee IRS office of detective Debraska's knowledge of the shootings and my undercover role with respect to the 1989 drug activity investigations that led up to said shootings. Specifically, on January 14, 1991, I was referred by Agent Gates to Washington County Sheriff Office ("WCSO") detectives Jansen and Theusch. The next day, I was introduced to IRS Special Agent Spang. With the exception of Agent Gates, we all met together where I shared information on criminal activities with many people and organizations. Agent Spang got involved because he was assigned to the Outlaws Task Force during this time. Since the 1970s I was an admitted member of the Outlaws where over the years I had informed on members of that gang. I had come into some information relating to the Outlaws concerning the Washington county murder of Michael Drobec. It was at this meeting, where I had also informed WCSO detectives Jansen and Theusch and Agent Spang to having knowledge of the said August 19, 1989 shootings, including detective Debraska's knoweldge [sic] in the same. I didn't learn at these meetings that detective Debraska and Agent Spang were close friends. When Agent Spang learned of this information with respect to the said August 19, 1989 shootings he told me that he and detective Debraska would talk of bringing this matter to light. Yet, this information of the August 19, 1989 shootings

in which I had told WCSO detectives Jansen and Theusch, including Agent Spang were ignored. The information attached as Exhibit 1 serves as a written confirmation of the fact that these law enforcement officials had unequivocal knoweldge [sic] of these murders but failed to bring these shootings to light.

14. When this didn't immediately raise alertness much, I contacted detective Debraska and prompted him to spirit the necessary cooperation in building a case against Joseph Isajiw, who was responsible for the said shootings. Specifically, on March 7, 1991 I called detective Debraska at Milwaukee police headquarters and told him that I was entertaining thoughts to go to the Milwaukee Journal/Sentinel with the occurrences surrounding the August 19, 1989 shootings. I explained that the choice was totally up to him on how to proceed with these said events. That evening, I voluntarily chose to accept the arrangement provided to me by detective Debraska, and met with him at Milwaukee police headquarters, along with Milwaukee police detectives Brian O'Keefe, Vincent Vitale, Ronald Castillo, Paul Stuhmer, and Milwaukee County Deputy District Attorney Robert D. Donohoo for purposes of approving the resolution of bringing to light the occurrences of August 19, 1989. The affidavit of Robert D. Donohoo shall serve, in part, as a written confirmation of the meeting on March 7, 1991 and is attached as Exhibit 3.

15. Once this March 7, 1991 meeting was established between the aforesaid Milwaukee officials and myself it was agreed that we would use the testimony of Mr. Heimermann to ensure the smooth prosecution of the August 19, 1989 shootings against Joseph Isajiw, and that way no one would have knowledge of my undercover role

in the days leading up to those shootings, or have knoweldge [sic] of the 1989 drug activity investigations themselves. As a result, it was also agreed by all parties situated at this meeting that I would not be prosecuted with respect to my undercover role in those shootings, and that I would be placed in witness protection, and given a new identity and relocated within the United States.

16. On March 8, 1991, I appeared with Deputy D.A. Donohoo and detective O'Keefe in the chambers of the Honorable Audry Y. Brooks, Milwaukee County Judicial Court Commissioner, for the purposes of obtaining a search warrant of the residence of 941 south 35th street in Milwaukee, which warrant was being sought in order to search for the bodies of Mohammad Binwalee and Dion Russell. I was present when Mr. Donohoo, detectives O'Keefe, Debraska and other police officers all agreed to portray the activities of myself and Mr. Heimermann as recruited government informants leading up to and post the said shootings not as informants to the court but simply as a pretext to create a conspiracy – like crime for purposes of the events establishing a condition precedent to the said search warrant proceedings on March 8, 1991 and all criminal proceedings thereafter. As a result, the police officers who had now become involved in the murder investigation were also aware of detective Debraska who was one of the officers investigating the drug activity of Mr. Binwalee and Mr. Russell at the time of their deaths. The trial court record and police reports in Milwaukee case no. 91CF911492 and 91CF911618 shall serve as a written confirmation of these directives issued to me by Mr. Donohoo and other Milwaukee police officers on March 7-8, 1991.

17. That same day of March 8, 1991 the search warrant was executed at the residence at 941 south 35th street in Milwaukee. The transcript of this then – sealed proceeding reveals that with detective Debraska serving as proxy, detective O'Keefe vouched for the reliability of me with respect to giving the Milwaukee police accurate information on drug deals on prior occasions. Both Mr. Donohoo and detective O'Keefe were present when I told the Court Commissioner Brooks that I was present when Joseph Isajiw shot and killed Mohammad Binwalee and Dion Russell and then buried their bodies in the basement. I also named Mr. Heimermann as simply being present at the shootings and as the person who later pawned jewelry taken from the victims. Mr. Donohoo and detective O'Keefe and other police officers were also aware that Mr. Heimermann had sold the jewelry for me without having any knowledge beforehand that the jewelry had actually belonged to the murder victims. As it was, the return to the search warrant stated that two dead bodies were discovered at the residence.

18. Once the bodies of Mr. Binwalee and Mr. Russell were discovered, I was housed at a Red Carpet Hotel near the Milwaukee Mitchell Airport. This was done because Mr. Donohoo and the police were concerned for my safety as a result of being a long-time government informant.

19. Mr. Donohoo's commitment in the above regard in that I would not be prosecuted in the said shootings, and that I would be placed in the witness protection program, and not to have to return to Milwaukee in connection to the said shootings is not only confirmed by the given fact that he and other Milwaukee plice [sic] had known that I was present at the shootings but is further corroborated, in part, by the the [sic] fact that with this

knowledge that I was present at the shootings Mr. Donohoo had arranged with my Ohio attorney Michael Kaiser to annul a pending court proceeding in the Hamilton County Circuit Court (Ohio), where I was summoned to appear in the court of Ohio on an unrelated charge of defrauding a hotel. In short, while I was housed at that Red Carpet hotel Mr. Donohoo took a phone call from attorney Kaiser and I was present where I heard Mr. Donohoo tell attorney Kaisier that I would be placed in the witness protection program as a result of these investigations and, therefore, that I would be unable to appear in the court of Ohio on the unrelated charges. Exhibit 4 shall serve as a written confirmation of the phone call between Mr. Donohoo and attorney Kaisier in March 1991. This information shows that on an appearance docket sheet in the case entitled *State of Ohio v. Edward J. Piscitello,* Hamilton county case no. B9008502, that a March 19, 1991 entry of a continuation to July 1, 1991 was entered by the Hamilton County Circuit Court, and where at the behest of Mr. Donohoo, attorney Kaisier had filed a motion to withdraw as counsel on April 3, 1991, on the assumption that I would never have to return to Milwaukee again, after I was placed in the witness protection program.

20. The contractual considerations between Mr. Donohoo and myself in that I would not be prosecuted in the said shootings, and that I would be placed in the witness protection program even though Mr. Donohoo and police had known that I was present at the shootings, and that once in witness protection that I would never have to return to Milwaukee in connection to said shootings again, is further corroborated, in part, by the June 6, 1997 affidavit of Edward A. Strutz attached as Exhibit 5. Mr. Strutz confirms that Mr. Donohoo and detectives Debraska

and Castillo *personally* had stopped by Mr. Strutz's house during March of 1991, and that these Milwaukee officials collectively (actually unequivocally) told Mr. Strutz and his wife that in no way would I be prosecuted for my undercover role as an informant inasmuch as being involved in the said shootings on activity that I was entitled to perform. This affidavit of Mr. Strutz was procured on my behalf by Milwaukee attorney William E. Fenger, and the [sic] submitted to the Wisconsin State Public Defender's Office on March 26, 1998. Moreover, to demonstrate further that I did my part here as I was asked to do and then some by Mr. Donohoo and company, and to show that I have been bringing these March 1991 events to the forefront and during the regular course of my trial, I submit a May 20, 2002 letter from my postconviction attorney Diane Erickson where Ms. Erickson confirms that I had written the State Public Defender over the years explaining these underlying issues and, further, due to lack of funding attorney Erickson simply appealed from the record as the late – previous postconviction attorney Mautner had established it – and thus because the State Public Defender failed to fund a meritorious post-direct appellate action the issues between Mr. Donohoo and myself were never litigated at the time in which I faced trial and subsequently on direct appeal. This documentation shall serve as a written confirmation of the fact that I have been pursuing the true events as they had occurred in these meetings with Mr. Donohoo and other Milwaukee police and myself on March 1991. This documentation is organized in chronological order.

21. In addition to the aforementioned events, Mr. Donohoo and Milwaukee County then – Assistant District Attorney Jon N. Reddin prepared statements and affidavits

for me to sign on March 13, 1991. Moreover, at the directives of both Mr. Donohoo and Mr. Reddin I was given a polygraph examination with respect to the occurrence surrounding the August 19, 1989 shootings. The results of the polygraph examination showed that I was being truthful in all respects to the said shootings. Exhibits 7 and 8 shall serve as a written confirmation of the statements and affidavits given to me to sign by Mr. Reddin and Mr. Donohoo, including the positive results of said polygraph examination.

22. Once the polygraph examination was completed and that [sic] I had signed the aforesaid statements and affidavits provided to me by Mr. Donohoo and Mr. Reddin, a large amount of money was given to me by these officials, whereupon then driven to the Milwaukee Mitchell Airport by these officials and flanked by several law enforcement officers, where I was placed on a plane and flown to the state of Arizona with a new identity.

23. A month later, however, a new tactic developed: Amid the cacophony of information provided by me with respect to the true occurrences surrounding the August 19, 1989 shootings, Mr. Donohoe [sic] and Mr. Reddin fine-tuned the proposed prosecution against Joseph Isajiw for the said shootings; the earlier tactic of having Mr. Heimermann testify against Mr. Isajiw was not working out as these officials had quite anticipated. Detective O'Keefe told me that because Mr. Heimermann had now made statements to the police touting me as a direct principal in the murders (even though I had recently learned that Mr. Heimermann did not make any such statements, or if he had that the statements were coerced by police), that the police now needed to bring me in from witness protection and try out a particular way to see if they could strike the

right tone for Mr. Heimermann's cooperation in the prosecution against Mr. Isajiw in the August 19, 1989 murders.

24. So, on April 19, 1991, I voluntarily returned to the state of Wisconsin in lieu of Mr. Heimermann complicating matters. My return was only to be temporarily, as a pretext to obtaining Mr. Heimermann's assistance in the prosecution against Mr. Isajiw, and without jeopardizing the 1989 drug activity investigations, including my role as an undercover government informant. Specifically, the police believed that once Mr. Heimermann was assured that I was in custody, he would feel safe, and then tell his full account to police about Mr. Isajiw's involvement in the said shootings. As a result of this plan devised by the Milwaukee officials, I remained confident that the prosecution against me with respect to the shootings were a pretext and that they were never an actual former proceeding. To demonstrate reasonable beliefs to conclude that the proceedings against me in 1991 were a pretext to first persuade Mr. Heimermann to cooperate in the prosecution against Mr. Isajiw, and then to cover up the 1989 drug activity investigations, including my role in those drug investigations, the very evidence offered against me at trial confirms this fact. For example, the prosecution against me centered on three witnesses: Joseph Isajiw, Anne Schrader and Joanne Danbrova. But these individual witnesses were actually targets in the scope of that 1989 drug activity investigation. So the evidentiary matter with which these witnesses were permitted to testify about with respect to showing that I intended to kill Mr. Binwalee and Mr. Russell were matters tha these witnesses parroted that actually reflected my activities as that undercover government informant not as an informant (because these witnesses obviously did not know that I

was an undercover informant in the investigations against them in 1989) but simply the matter with which these witnesses were testifying about were matters giving rise to that pretext to create this conspiracy – like crime for purposes as a condition precedent in order for the Milwaukee officials to commence the criminal cause of action on March 8, 1991. In other words, because the prosecution had tried the case on activity that I was entitled to perform with my law enforcement handlers in those 1989 drug activity investigations against Mohammad Binwalee et al., provided me with a reasonable belief that the prosecution against me was feigned from the out-set, and that my return to Milwaukee from witness protection was only to assure Mr. Heimermann that I was in custody, so that he could feel safe, and then tell his full account to Milwaukee police in the developed prosecution against Mr. Isajiw. In any event, after the jury trial, instead of being released back into witness protection, I was convicted of two counts of first-degree intentional homicide as party to a crime, and in imposing the mandatory life sentences, the trial court ordered that the sentences be served consecutively.

25. I further state that in a 1994 postconviction motion brought by my postconviction attorney Mautner in the trial court, Milwaukee County then – Assistant District Attorney Karen Christenson referred to me in her public memo to the court opposing the motion as a "snitch for state and federal authorities". These events were not only a breach of the previous agreements struck between Mr. Donohoo and other Milwaukee police and myself in that these officials would not disclose my role as a long-time government informant but these events by Ms.

Christenson now put my safety in grave jeopardy within the Wisconsin state prison system.

26. Ms. Christenson's breach in putting my safety into jeopardy escalated to a point where I was ultimately transferred out of state on April 3, 1996, as a protection management case. During the vast majority of my out-of-state stay I was housed in protective management units. For these reasons, I was essentially precluded from communicating with the 'outside' world in an adequate manner of the factors that link the aforesaid said Milwaukee offcials [sic] to the illegal prosecution of the 1991 case. Exhibit **9** shall serve as written confirmation of the events that caused me to be placed out-of-state in protection management units as a result of Ms. Christenson's breach. Thus, it was not until my decision to return to the state of Wisconsin in March 2000 and reveal the true occurrences of the August 19, 1989 shootings that Mr. Heimermann could finally begin to present his case.

27. Finally, in a dialogue with U.S. Customs Special Agent Buford E. Gates, he confirms the majority of the fraud and illegal activity with respect to the Milwaukee officials contained herein. In essence, when detectives Debraska and his confederates had learned that Mr. Heimermann had started to make a long list of assertions about what law enforcement agencies' [sic] knew of the circumstances surrounding the said murders, including their- relationship with me in the days leading up to those murders to the courts concerning his own post-direct appellate actions, these Milwaukee officials knew they may get in trouble with the law until they decided to pin the cover up of the murders on U.S. Customs Special Agent Buford E. Gates, that they did indeed falsify against Agent Gates, and did so to keep Mr. Heimermann's spotlight

on Agent Gates and far away from these Milwaukee officials, the actual law enforcement officers who had in fact covered up the true occurrences surrounding the murders, whereupon Agent Gates contacted me in Florida in October 1998. It was during this time that Agent Gates and myself assembled an elaborate dossier of information concerning the hereunder cover up and conspiracy of silence with respect to these Milwaukee officials named herein, and then Agent Gates filed the account of information contained herein with Milwaukee County District Attorney E. Michael McCann himself. However, presumably political considerations and stalling efforts to indict rogue public officials are at work here, to this date Mr. McCann has yet to respond to either Agent Gates or myself. Indeed, to date, no such effort had been made that I am aware of by authorities on a higher level to play a crucial role in bringing the Milwaukee officials mentioned herein down. And therein lies this 1991 criminal cause of action portrayed over the last 11 years as a natural product of the judicial system the transformation of an undercover drug activity investigation gone awry into an intentional shooting and killing of two high-profile drug dealers in retaliation of a drug deal gone bad. My conclusions are that so gross a distortion of the facts in this case cannot be countenanced, and shouldn't.

28. In addition, to further confirm the accounts of the 1989 drug activity investigations contained herein, I list below individuals' names whom [sic] were targets within the scope of those drug investigations and because of my employed role as an under-cover government informant in those investigations, these people were surreptitiously surveilled, arrested and prosecuted for various crimes, such as narcotic dealing to prostitution:

(a) Max Adonis

(b) Frank Alioto

(c) Mohammad Binwalee

(d) Cheryl Brown

(e) Joanne Danbrova

(f) Dynel Goldsmith

(g) Sony Harrison

(h) Richard Heintz

(i) Benny Hephner

(j) Joseph Isajiw

(k) Nicholas Isajiw

(l) Earl Jackson

(m) Bobby Lange

(n) Michael O'Connor

(o) Juan Rodriguez

(p) Dion Russell

(q) Anne Schrader

(r) Christine Schroeder

(s) Bobby Theno

(t) Michael Weitstein

(u) Alicia Williams; and

(v) Keith Zerwes

29. The Exhibits to this affidavit are true and correct copies of documents that they purport to be.

30. This affidavit does not exhaust my knowledge of the events to which it refers.

/s/ Edward J. Piscitello
Edward J. Piscitello

Subscribed and sworn to before me
on this 10 day of September, 2002.

/s/ Jodi Risen
Notary Public, State of Wisconsin
My commission expires: 11-24-2002

Wisconsin State Public Defender
315 N. Henry St. – 2nd Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087/Fax Number: 608-267-0584
www.wisspd.org

[LOGO] *Protecting*
Justice for all
Since 1977

Nicholas L. Chiarkas
State Public Defender

January 8, 2004

Edward J. Piscetello #89444
c/o Columbia Correctional Institution
2925 Columbia Drive
P.O. Box 900
Portage, WI 53901

Re: Court Case #91CF911492 and 91CF911618

Dear Mr. Piscetello:

Your case file by Attorney Jill Tan has been located and retrieved from the state's Records Center. Enclosed are copies of Attorney Tan's notes as you requested in your letter of December 15, 2003.

You had also requested vouchers regarding investigative work and the name of the investigator in this case. The record indicates there was only one staff investigator, Bill Seiden, who retired from state service almost three years ago. Staff investigators are not required to submit vouchers, and at that time they were not required to record their hours of investigative work on a case either. Consequently, I have no further information regarding the case investigator.

Thank you for your patience, and good luck in your legal pursuits.

Sincerely,

/s/ Karen Thomas
Karen Thomas
Executive Staff Assistant

Enclosures

Piscetello MCJ
6/7/91

332-4640

Buford Gates Feds
bail motion – can get up to $150,000
Bobby Theno Benny Hefner

Witness Protection People
1.) Barry DeBraska
2.) Lori Weber
gave $300.00 plane ticket to Phoenix said call called every day. Costillo was supposed to have $500 or so. But didn't have $. called back. Talked to O'Keefe Place on Van Buren in Phoenix. O'Keefe sent $100.00.
Scott Langheart in New Jersey
603-878-1694
Δ made call to O'Keefe who said would put on credit card. Called collect.
Barry & Ron said nothing would happen as long as Δ didn't do the shooting.

Then got $1,000 while still in Phoenix
"Around the Globe" code word [in name John Connors]

Was in wholesaling, retailing & met Scott L. who suggested he go to San Diego where business would be better.

Called Barry – was waiting for $ from Castillo said call back wanted enough $ to get out of witness/protection

DeBraska agreed to allow Δ to return to Milwaukee & got $400.00 to pay for ticket.

Wanted to return to Milwaukee to deal w/situation.

Gave DeBraska phone # where he was @. then detectives came to pick Δ up for 2 counts of 1st ° Intentional Homicide.

Then made statement to Castillo in San Diego & put Scott & Joe in it. Scott then put Joe & Ed there, too.

John Briseneus – keep as reserve.
Bobby Theno – picked up tab

(1) Supplemental Discovery Demand re: Witness Protection Program

(2) Contact Feds. re: info on Max Odonis

(3) Medical Records release for Columbia
Holy Cross in Fort Lauderdale
Providence Hospital in Cinncinati [sic]

(4) Western Union records & phone records from Phoenix & San Diego.

Closing Notes

DeBraska Pager 575-9312

Proof of religious commission (<u>coming forward</u>)

<u>bargain</u>
<u>corroboration</u>

Why would Ed kill T.C. when Joe was the person shorted on cocaine?

Joe – forensic evidence doesn't support Joe's version of how the shooting occurred all, but one bullet wound is basically horizontal – with 2 actually angling upward which is completely inconsistent w/Ed standing at the top of the stairs shooting down at T.C. & Dion. You saw the stairs – they're steep & narrow.

Why kill T.C. – was in a position to make T.C. squirm w/o killing him. Could even rip him off on a regular basis w/o killing him. He had taken care of T.C. by setting him up to be busted

gangster wanna be

Ed talks a good line –

1) work w/the cops

2) play by man on the street

Asked by the cops to do illegal thing & he does them. Asked to participate in illegal activities. When he

Ed Piscetello McJ. 11/12/91

[Illegible] knew about Bobby Theno – re: Scott [Illegible] about Ed going to cops

(city) Grand Hotel – real tall detective whose wife works at training academy

Marks, [illegible]
under cops name

(county) Best Western name Sgt. Mackey

Doctor re: smoking cigarettes/withdrawal

got dope & organized crime connection through unknown [illegible]

DeBraska
[illegible]
Joe Lagermans
Wara
Alan Wilke
Iran Cross Krause
Lori Weber

Central Parkway – security guard downstairs in bowling alley. Black male "John" doesn't know last name. Always wore Army fatigues & talked about army a lot

Knows about Scott & Joe having guns 38 & 45 were his favorite

Joe would clean them w/golfing gloves – were his "babies"

Joe is a gun nut. Excellent w/gun. Was at Nicks cabin w/Joe, Terry, Scott fired his power rifles etc...

Joe called Nick about burying the bodies – put plaster over them bury 2 ft down & concrete it over. No one will ever smell it.

Could get weapons through Nick

Small room in basement reminded Joe of a den [illegible] like at Nicks

---

GENERAL AFFIDAVIT

STATE OF WISCONSIN
SS
COUNTY OF MILWAUKEE

I, Edward H. Strutz, do hereby swear (or affirm) that the following statement is true and all facts contained herein are correct, and that this statement is made from my own free will without any duress, and is made from my own personal knowledge. I HEREBY STATE:

During the month of March, 1991 Detective DeBraska called and stoped [sic] by our house due to the fact that he was assisting with keeping my son, Edward J. Piscitello, in hiding and safe.

He told my wife and I that the killings on 35th Street would not put my son in prison no matter what part my son played. My Son was going to be sent to Arizona for safety with his help. He also stated that Bobby Theo was never going to be a problem anymore. On one other ocassion [sic] two other men came to our house, they were Detective Caotillo [sic] and Robert Donahue from the District Attorney's Office and stated that my son was going to be okay for just coming foreward [sic] with his crime no matter what his part in the crime was.

My wife asked him if that was the truth and the one named Robert said "trust me."

FURTHER, THE AFFAINT [sic] SAYETH NAUGHT

/s/ Edward Strutz
Edward Strutz

NOTARY

The foregoing instrument was sworn and subscribed in the state and county aforesaid before me on this 6TH day of JUNE, 1997.

is permanent /s/ William E. Fenger
My Commission ~~expires on:~~ Notary Public of Wisconsin
Wisconsin State Bar
No. 1009003

[SEAL]

PO15-B S-89 SUPPLEMENT REPORT
MILWAUKEE POLICE DEPARTMENT

0 INCIDENT SUPPLEMENT
0 ACCIDENT SUPPLEMENT
0 JUVENILE SUPPLEMENT PAGE ___ of ___

DATE OF REPORT INCIDENT/ACCIDENT #

INCIDENT INFORMATION

INCIDENT Homicide (Shooting)

DATE OF INCIDENT/ACCIDENT
3-8-91 (Discovery date) REP CON #

VICTIM

LOCATION OF INCIDENT/ACCIDENT (Address) DIST

JUVENILE LAST NAME FIRST MID

DATE OF BIRTH 0 DETAINED
0 ORDERED TO MCSS
0 OTHER

LOAN TYPE OF PROPERTY DESCRIPTION
SERIAL # CODE # VALUE

On Mon. 3-18-91 *Det B.DeBraska* received information from *Ed P.* that when he was investigating *Keith A.Zerwes* W/M4-28-56 of 2445 W. Wisconsin Ave a B/M known as *T.C.* was residing in the same building as Zerwes. Info is that Zerwes was the building mgr. in Apt.101 between the

months of May and July 1989. Info is that T.C. lived one floor below with another B/M. Another person who resided there during this period was a blonde female named *Shawn Taylor*, and that she knew T.C. personally and became the live in girlfriend of *Robert Theno* and she is presently living at 5017 S.55th st. apt. C-102.

Det. DeBraska also stated that he arrested a subject *Dynel Goldsmith* for DOCS(cocaine) who frequented this building and personally knew T.C. This person should still be incarcerated somewhere in this state on those drug charges.

Det's Vitale and Stuhmer were checking on the info received from this info on the building at 2445 W. Wisconsin Ave, and as they went to said area they observed that the building was being razed at this very moment. There is no info on the past owner at this time but will be checked and results will be filed on same.

I Det. Castillo called Shawn Taylor and she does remember that she did spend time living at that address during the period in 1989,but believes the person she knew was T.C. was in fact a W/M. She cannot give any specifics regarding that person. Nothing more regarding this info at this time. The subject Dynel Goldsmith has not been contacted at this time.

[DeBraska states; this shows us in that area doing investigations]

[DeBraska in this report makes it sound like he didn't know T.C. But read Tom's report.]

REPORTING OFFICER DET. RONALD CASTILLO

PAYROLL # 37788 LOC CODE 92

SUPERVISOR SIGNATURE

On Tuesday, July 18, ~~1991~~ [89] I was working in an undercover capacity with a confidential informant (Eddie). I was introduced to John Doe "Keith B/M 25 5'8" 170-180 lbs stocky build with tatoo [sic] on right arm. This took place at 2445 W. Wisconsin Ave. Apt. 202. This was the 2nd floor apartmen [sic] West side of the building, front apartment facing W. Wisconsin Ave. I purchased a quantity of cocaine from Keith. Information from the C.I. was that Ruby and T.C. lived there. Keith had a Red Chev [sic] Nova (68) and T.C. had a White Mercury. T.C. wanted guns for cocaine.

On Thursday, July 20, ~~1991~~ [89] I again went to 2445 W. Wisconsin Apt. 2 to purchase cocaine. I was met at the door by "Ruby" B/F 20 and was told that T.C. and ~~Leon~~ [Keith] had gone to Chicago to pick up and would be back later.

On Saturday, July 22, 1989 at 1:45 P.M. I again went to 2445 W. Wisconsin Ave. Apt. 202 and met with John Doe "~~L~~[D]eon" B/M 16-18 5'8" 160 lbs. He delivered a package of cocaine to me. I also met with T.C. T.C. had been sleeping and came out of the bedroom. I had conversation with him regarding me trading him guns for cocaine. He wanted to see my guns. I told him I had the guns in the car and he wanted me to bring them up to the apartment. I refused and he sent ~~L~~[D]eon down to my car where ~~L~~[D]eon examined the gun I had brought with me. I left my beeper number with T.C. and told him to call me when he wanted to do something. He never got back to me. As I recall T.C. was a B/M 26-30 5'6 140. He was wearing gold jewelry. Conversation from these indiviuals [sic] revealed that they were gang members from Chicago.

Keith had numerous tatoos [sic]. To the best of my recollection the utilities or phone were listed to *Alice Williams* or *Williamson*.

[All three of us were in that area and Tom and Berry knew it.]

During July of 1989 Det. Wilke had occasion to interview *Keith Zerwes* W/M 4-28-56 who had been residing at 2445 W. Wisconsin

Zerwes expressed an interest in cooperating with the police in narcotics investigations. Zerwes made one controlled buy from T.C."s wife – *Alicia Williamson* B/F 20-25 5'4" 105 lbs. at that same apartment. Zerwes new [sic] T.C.

In August of 1989 I learned that TC had moved to 417 N. 29th ST. Apt. A phone # 342-5961.

I also had numerous conversations with the confidential informant "Eddie" about his aunt ~~lie~~[die]ing and his moving into her house and that we could use that house for "deals". I also recall running into the informant sosm [sic] time after that and he was driving a new BMW and had expensive clothes on. We had a short conversation and parted. This was in the 1400 block of N. Water.

Upon checking B Of I records there are three *Alicia Williams* B of I #'s 205412, 222719, & 200894.

Alicia Williams B/F 12-22-64 of 1909 N. Lamar Blvd. was arrested for prostitution. This could be alias used by Alicia Williamson

REPORTING OFFICER Det. Thomas Gorecki

PAYROLL # 35149 LOC CODE 88

SUPERVISOR SIGNATURE

_____

June 20, 2000

Hi Scott,

Attached is the statement you requested of me. Please excuse the tardiness. I have been out of the country plus the statement required considerable research and effort. I don't know if it helps but I am certainly aware of, and convinced that something is amiss in Milwaukee relating to this whole situation. If false accusations can be made against a respected federal agent, then it can certainly happen to others. As I said before, however, you are in a box to prove it. It is also difficult to overturn a conviction if a witness later recants. The court must ask the witness "when you were lying, then or now?" and they don't want to get into that unless there is persuasive evidence.

I cannot send this statement to the FBI. You, however, can. I cannot call them either. Normally investigators call the witnesses. Are you sure the FBI is pursuing an investigation on this matter? They cannot tell you what they are finding out but they should be able to tell you what the alleged violation is at least. What do they say they are investigating?

Who is Atty Kohler by the way? I can't recall ever hearing that name and is [sic] name does not appear in any of my documents, but perhaps you could jog my memory.

I just hope justice prevails.

/s/ Buford

Question

1a Statement concerning police officer Barry DeBraska and my knowledge of his attempts to frame me for my alleged failure to advise competent law enforcement officials about what I knew of the subject murders.

Answer

On March 14, 1991 I was visited by Milwaukee Police Officers Brian O'Keefe and Kevin Stuhmer. This was six days after the bodies were found I believe. Both officers made it appear as a routine peer police request to learn what I knew about Ed Piscatello, Robert Theno and Scott Heimerman. They were interested in knowing what/if any admissions were made by Ed Piscatello regarding his role in the subject murders. I let them look at the relevant files and make photocopies of whatever they needed. When they left my office, I documented this disclosure on Customs Form 191 in accordance with our guidelines. I didn't think too much about it at the time. I didn't know their relationship to DeBraska. Both were beseeching and not at all adversarial. I was under no obligation to share my files with them. I could have sent them packing but I don't believe in that. I thought they had a legitimate law enforcement mission so I gave them not just the information but allowed them to look in my files. Needless to say, there were no admissions or confessions from Mr. Piscatello or anyone else regarding the murders. I provided them with the last known telephone number in Florida that I had for Mr. Heimerman. (As I recall, I was unsuccessful in reaching you. You called me once or twice also without success. Next time I tried reaching you by phone, your number was disconnected. I thought you had changed your mind about

cooperating with me about the telemarketing scams, etc., that you were believed to be involved in).

It wasn't until I transferred to Washington D.C. in 1994 that I learned about the allegations that had been made about my covering up the murders for Mr. Piscatello. In 1995, I obtained the investigative file of our Internal Affairs investigation under a Freedom of Information Act request and learned that O'Keefe stated to our investigators in 7/94 that I had "stonewalled" him and Stuhmer during their visit to office and that I acted as though I had something to hide. I was shocked. As I later recounted to Reddin and then to McCann, I couldn't have been more cooperative. I didn't have to be. They had no right to see my files. I could have ignored them, told them what I wanted, asked them to come back some other time, told them to get me some coffee . . . whatever. If I were guilty of anything I had every opportunity and legal right to tell them to get out. Why didn't I? I am a lot more educated and experienced in the law then they are/were.

It then became obvious to me that when a police officer lies there must be a reason. Knowing now what I know, tends me to believe your story for the same reason. I also later learned that O'Keefe was a friend of DeBraska's. I wondered later why DeBraska himself didn't approach me. I didn't know these two officers. They were sent to get incriminating evidence and when there was none, they had to lie I guess. It also adds to the number of witnesses who are prepared to say the same lie . . . the blue line.

Law enforcement officers and officers of the court have no legitimate reason to lie unless they are covering something up. The question is what is it and can it be proven?

1b. Brief statement of this detective's involvement with Robert Theno and the circumstances surrounding Mr. Theno's girlfriend, Shawn Taylor.

Answer

I do not specifically recall the name SHAWN TAYLOR. I do, however, recall being contacted by a woman who identified herself as Robert Theno's girlfriend. She was a dancer, I believe. She told me that she was being harassed by Barry DeBraska and other Milwaukee PD officers, Costello rings a bell. She was being followed, was receiving strange phone calls, etc. She felt threatened and was frightened. She said she was given my name my [sic] Robert Theno because he believed I was a trustworthy law enforcement officer. I told her that this was not within my investigative authority and advised her to call Milwaukee Police Internal Affairs. I did not obtain a statement from her.

As to why DeBraska would harass her. I was told DeBraska wanted to be in a position to know about any criminal activity by Mr. Theno and his associates. I was told that DeBraska wanted to be the person who arrested Theno and the one to debrief him for the trove of information that he was believed to possess. This was all for selfish professional advancement I guess. I suspect it was intended to reestablish DeBraska's reputation as an effective police officer, a reputation that was fading fast because MMEG had better cops more willing to spend the time to achieve results. I didn't know that, I learned that.

I know little about Robert Theno's involvement with Detective DeBraska. I have no direct information about them other than they were aware of one another. I heard that DeBraska was investigating Theno for suspected

illegal activity. I also heard that DeBraska was worried that I would arrest Theno and steal his thunder, i.e., to have him work on the Theno investigation without yielding any results. This had happened in a prior investigation. One that DeBraska had been involved in for three years without success but one that I had been successfully involved in. I received critical assistance from the Milwaukee Metropolitan Enforcement Group (MMEG) police officers. DeBraska had provided some cryptic information during the information gathering stages of the investigation but declined to participate when it came to actually performing the more routine investigative activities of the case, even when invited to do so. We eventually arrested several individuals, seized houses, cars, etc. DeBraska was upset that he had been "upstaged" and made statements to others, including other convicted criminals, that the feds stole his case and cut him out. That was a lie. He cut himself out when he couldn't be the principal investigator in the case. He was very upset with me for using MMEG's lockup for the arrestees instead of MPD's. I had called him on two occasions as a courtesy to participate in the arrest of the some of the local individuals whom he had been targeting for several years. He went into a petulant tirade about using MMEG detectives and their lock up. He declined my offer to participate in the arrests. I ended up hanging the phone up on him. This event was corroborated. My supervisor, Gary Peterson and DEA Special Agent in Charge, Kelley Snyder were in my office at the time and heard part of the conversation. I also told them what had just happened.

1.c. The date Detective DeBraska's name first became known to you.

Answer.

I cannot recall the date. It was sometime in 1988 I believe. I heard from other law enforcement contacts that he was a veteran detective and knew much of the criminal activity was occurring on Milwaukee' south side. Because I had some south side suspects, I arranged a meeting with Detective DeBraska to debrief him and to learn what he could tell me about the subjects I was investigating. I subsequently met with him at MPD. His lieutenant, James Kelly, and an IRS agent also attended the meeting.

Question

1.d Any signed or formal statement obtained from Detective DeBraska

Answer

No. We never met again after the initial meeting at MPD. I spoke with him a few times on the phone after that, mostly to invite him to participate in arrests or raids that related to the case I talked to him about originally.

Question

2. A brief statement regarding Robert Theno's knowledge of this case.

Answer

By this case, I am assuming, the double homicide. It would be improper to state what I learned, if anything, from Robert Theno. You would have to ask him. The same goes for any statement, if any, obtained from Mr. Theno. I can tell you that he never told me that you or Eddie Piscatello, et al, killed the two subjects at issue.

Question

The date Edward Piscatello first came known to me

Answer

I believe it was 12/27/90. I first met Ed Piscatello on 1/8/91, I believe.

Question

Did you and Mr. Piscatello ever work together on criminal investigations against Mohammed Binwalee, also known as "TC" and any other of the Gangster Disciples street gang for drug trafficking?

Answer

No. My role was to investigate the international aspects of drug trafficking, e.g., smuggling of drugs and narcotics into the United States. I was not aware of these names until the newspaper article about their murders was published.

Because of legal restrictions, I cannot provide you with any statements obtained from Mr. Piscatello, if, in fact, they exist. Mr. Piscatello might be more helpful and must speak for himself.

Question 5. The date you first knew IRS special agent Mike Spang

Answer.

I was an IRS special agent before joining Customs in 1988. I knew Spang then and, in fact, at one time I was his supervisor. With his approval, I introduced Mr. Piscatello to Washington County Sheriff's detectives. I believe they later introduced Spang to Mr. Piscatello. They met together on

1/15/91 where, I believe, either a confession or admissions were made about the double homicide in question. I was not present at that meeting.

Question

Provide a statement regarding agent Spang and his knowledge of this case.

Answer

I shared information on criminal activities with many people and organizations while I was in Milwaukee. IRS agent Spang was one of them. He was assigned to the Outlaws Task Force during this time period. I had obtained some information relating to crime involving the Outlaws. Because it was not within my investigative purview, I obtained authorization to turn the information, and the person providing it, to the proper authority. I believe Spang got involved that way. See above answer to explain Spang's obvious awareness of the murders way before I knew of them. He, in fact, at one point admitted to knowing of the murders on 1/15/91, the date that he met with WCSO and Mr. Piscatello. This fact was conveniently ignored. He and DeBraska were friends.

No, I never obtained a statement from Spang. He was interviewed by our Internal Affairs investigators on 4/28/95. His statement, which I obtained under the FOIA, said that I had not withheld information as far as he knew. This does seem to contradict a statement made by ADA Reddin who told our IA investigators that Spang telephoned him on 4/20/91 and said that he had told me of Mr. Piscatello's involvement in the murders and that I had told Spang that I would "Take care of it." This never happened of course. Spang didn't say the same thing to

our investigators. Why not? Is he lying here to avoid risk of perjuring himself to federal agents or is it Reddin lying to further the conspiracy you reference?

According to Spang's statement, he contacted ADA Reddin on 4/20/91 to advise him of the newspaper article, which discussed the murders. Spang said he told Reddin of Mr. Piscatello's possible involvement. Note that Spang stated to another witness that he learned of the murders on 1/15/91. It was he who had heard the confession, not me.

Question:

Do you have any knowledge of attorney Martin Kohler

Answer

No.

Question

Identify SO16MK.

Answer

I think it was actually SA 16MK. I cannot identify this person for you.

Many of your questions, I cannot answer because of protected communication, hearsay, etc. What I can say is that I have firm reason to believe that Barry DeBraska, et al, are lying and are corrupt. I say this because of what he allegedly caused to happen to me. He was not alone in that, of course. I can only say that I became under investigation by our Internal Affairs people after Milwaukee detectives (DeBraska and his partners) advised them that I had covered up the murders of the two individuals you, Ed Piscatello, etc., were convicted of. I obtained documents

from Internal Affairs after filing a Freedom of Information request. I kept the pertinent files and followed up with several letters to the Milwaukee County District Attorney's Office. I started with Jon Reddin who was not responsive to my complaint. I subsequently wrote to District Attorney E. Michael McCann himself advising him of Mr. Reddin's failure to respond to my letter. I found Mr. Reddin's lack of concern a bit troubling. I had known him, at least superficially, while I was employed in Milwaukee. I would've hoped that he would have realized the extreme discomfort that these allegations had on me or would have on any serious-minded, professional law enforcement officer. Mr. McCann did not respond with any interest but merely cited the difficulty they would have in pursuing the allegations I made against DeBraska and his partners in the Milwaukee Police department.

Question

Detail the filings made to the Milwaukee Country [sic] District Attorney's Office regarding this matter.

Answer

I first contacted ADA Reddin on April 22, 1991. I called and heatedly complained about DeBraska's professionalism and behavior. Reddin later said that he recalled this conversation but did not recall more substantive events surrounding the murders. Another anomaly that I recounted in my letter to Reddin after he was interviewed by our Internal Affairs people. I found his casual handling of these statements made by MPD officers both offensive and unprofessional.

On 5/16/96 I sent a letter and exhibits to Reddin. I pronounced my innocence and disgust at this whole matter as

well as my belief about who really knew about the murders and why I had been fingered. Basically, everything I thought to be true was later corroborated by the statements made by others (and ultimately you and Mr. Piscatello) or the timeline of events. I carefully tracked each event by the statements made by others involved in this and asked the same questions. Why is this person or that one lying? I also question what happened to the file that MPD said they had regarding my role in this series of events. That file had conveniently disappeared. I doubt that it ever existed, it would document lies that would place the liar at documented risk.

On May 15, 1996 I called ADA Reddin to advise him that I was sending him a detailed complaint about DeBraska, et al, and their allegations concerning me. I subsequently did so. My complaint, with exhibits, corroborates virtually every detail that is now being told regarding my involvement. In a one paragraph letter dated 6/2/96, ADA Reddin stated that he had very little recollection of the matter about the "bodies in the basement." (Attached)

On 6/19/96 I sent a detailed letter, complete with exhibits, to MPD Chief of Police Philip Arreola complaining of the lies and deceit displayed by DeBraska, O'Keefe, Stuhmer. When I did not receive a reply, I wrote again, on 8/19/96. On 8/23/96 I received a reply from Chief Arreola's office saying the matter had been referred to MPD's Office of Internal Affairs and that they would notify me of the results of their investigation. I was never contacted as a witness nor did I ever receive notification of the results of their investigation. Because it would logically end up in the DA's office, I guess that is where it died. (Also, Chief Arreola left the department around that time period I believe).

On June 20, 1996 I replied in detail to ADA Reddin's letter of 6/2/96.

On 8/19/96 I wrote to DA McCann complaining of ADA Reddin's lack of concern for the lies that had been promulgated by his law enforcement officers and money that had been wasted as a result of it, not to mention obstruction of justice. I received a reply from Mr. McCann dated 12/5/96. He spoke of the aged nature of the allegations, lack of legal tools to remedy my assertions, and competing resources within the police department. I replied to him on 12/31/96. On 10/9/98 I wrote again to Mr. McCann after Mr. Piscatello told me of the conspiracy that I always suspected and believed I had proved without his confession. Mr. Piscatello had volunteered an affidavit to this effect and allowed it to be passed to Mr. McCann. I received no reply.

I have attached several documents relating to assertions made in this statement, some whole; other redacted because of sensitive information. I have many others that documented my quest to prove my personal innocence relating to the allegations made against me. My statement, as well, as my involvement is limited as far as the murders are concerned. My key contribution relates to my being able to prove that aspects of this whole incident, at least as they involved me, were fabricated by DeBraska and his associates. It shows their propensity to lie. Presumably there is a corrupt motive for that.

/s/ Buford E. Gates
Buford E. Gates
June 20, 2000

Internal Revenue Service
memorandum

Date: April 21, 1991

To: Assistant District Attorney Jon Reddin
Milwaukee County

From: Special Agent Michael Spang

Subject: Interview Report

On January 15, 1991 Detectives Robert Miotke, Mark Jansen (Washington County) and I interviewed Edward J. Piscitello at a restaurant in the Milwaukee area. The interview focused primarily on Piscitello's knowledge of the Outlaw Motorcycle Gang and related matters. During the interview Piscitello asked to speak to me in private, and he provided the following information:

1. Piscitello admitted killing two "BOS" gang members, who he said had killed Max Adonnis. Piscitello "owed a favor" to a part owner of Sally's Steakhouse. The "owner" asked Piscitello to commit the murder, and he (the owner) provided the weapon that was used in the homicide. Piscitello implied that a second person was involved in the shooting, but he did not identify this individual, or the previously described "owner".

2. Piscitello described the two victims as being seventeen (17) and nineteen (19) years old. He also stated that they were both black males. One of the victims told Piscitello immediately before the shooting that he wanted his "mom" told where he could be found.

3. Piscitello then asked me how he could get immunity for testimony with respect to the above

information. I told Piscitello that he should have his attorney contact me or U.S. Custom's Special Agent Buford Gates.

Piscitello also telephoned me after the interview and stated that he was going to cooperate. Piscitello has not contacted me since that time. Attached to this memorandum are copies of by notebook entries with respect to all contacts with Piscitello. These notes were made during, and shortly after the respective interviews.

/s/ Michael Spang
Michael Spang
Special Agent

1/15/91 re: CS EP
Phone 6:45 PM

(1) CJ wants to cooperate – I am girlfriend in trouble in Ohio for $2200 theft – Dues that he/she has to come up with all the facts through his attorney

(2) DOB / 12/29/53
SSN 395-62-4388

Memo Called Gates – will restrict my involvement to AOA & R.R. CJ has provided reliable info in the past.

1/15/91 CJ/Miotke & Jansen
10:45 – 12

(1) ~~[Illegible]~~

(2) Dreiser or Millazzo – Attorneys
Edward J. Piscitello

(3) Max – 2 BOS members – & is 17 – one is 19 – they are dead – one of them told CJ to "tell his mom" before he shut his eyes – CJ owed favor – suspect gave him a gun & instruction order came from past owner of Sally's &

~~[Illegible]~~

(5) Outlaw drug activity in To's – controlled east side

(6) has info on [Illegible] – Ansteth – Hugu – [Illegible] brothers

(7) John is [Illegible] son – the one indicted is a cousin

(8) discussed immunity letter

[LOGO]

SSF

CLASS_____
SRC'D_____
SER _____
REC _____

United States Department of State
Washington, D.C. 20520

UNCLASSIFIED

APR 17 1990

In reply refer to:
PPT/C – BINWALEE, Muhammad D.

Mr. William Sessions, Director
Federal Bureau of Investigation
Washington, D.C. 20535

Dear Mr. Sessions:

This is in reference to your recent notice, concerning Muhammad D. Binwalee and aliases, file number 265 581 EA8.

Notices have been placed into our computer system in his name and aliases, to reflect that he is the subject of an outstanding Federal warrant prohibiting the issuance of a United States passport. The notices will remain in our computer system for a period of ten (10) years.

Please notify this office when passport restrictions are no longer necessary, so that we may remove the notices from our system.

Sincerely,

Sharon E. Palmer-Royston, Acting Director
Office Of Citizenship Appeals
Legal Assistance

by /s/ Faye L. Rosenberg
Faye L. Rosenberg

Dept. of State, RPS/IPS, Margaret P. Grafeld,
Dir. (X) Release ( ) Excise ( ) Deny ( ) Declassify
Date 5/07/03 Exemption _____

UNCLASSIFIED

INTERSTATE FLIGHT – MURDER

WANTED BY FBI

MUHAMMAD D. BINWALEE

Date of Birth:	June 2, 1967	Hair:	black
Place of Birth:	Chicago, Illinois	Eyes:	brown
Height:	5'6"	Complexion:	dark
Weight:	140 pounds	Race:	Black
Build:	slender	Nationality:	American
Occupation:	sells narcotics		

/s/ Muhammad D. Binwalee

[Picture And Fingerprints Omitted In Printing]

CAUTION

BINWALEE, A KNOWN MEMBER OF THE BLACK DISCIPLE STREET GANG, IS BEING SOUGHT IN CONNECTION WITH A MURDER IN WHICH THE VICTIM WAS SHOT SIX TIMES AT CLOSE RANGE WITH A HANDGUN. CONSIDER ARMED, DANGEROUS AND A DRUG USER.

DIRECTOR /s/ William S. Sessions
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D C 20535

FEDERAL BUREAU OF INVESTIGATION

Reporting Office CHICAGO

Office of Origin CHICAGO

Date 12/7/89 Investigative Period 6/29/89-12/7/89

[Illegible] of Case Muhammad, D. BinWalee, aka;
Anthony Bryant,
Walee BimWaler,
Haroon BinWalee,
Anthony Howard,
Anthony Howards

SSF
CLASS_____
SRC'D_____
SER _____
REC _____

Report made by
Detective ~~[Illegible]~~ CPD,
FBI Violent CrimeTask Force
Typed By: GHP
Character of Case
UFAP-MURDER

SUMMARY
NON-PROSECUTIVE SUMMARY

The Defendant Muhammad D. BinWalee, has been friends with the victim David Curry, up until 1/21/88 when both parties had a disagreement ~~of~~ [over] some proper [illegible]. The Defendant promised to get even with the victim. On 7/2/88, the victim appeared at the home of a mutal [sic] friend ~~a~~ [of] the Defendant, in Chicago, Illinois. While the victim stood on the street talking with friends, the Defendant arrived in an auto, exited same walking up to the victim then shot the victim with a handgun; while as many as five witnesses looked at the incide [illegible]. The victim while laying on the ground shot, stated to the Defendant, "Muhammad, don't kill me". The Defendant, now standing over the victim replied, "Why shouldn't I kill you", then the Defendant pointing his weapon down at the

victim, fired six times into the victims body. The witnesses seeing this, then saw the Defendant get back into the same auto he had arrived in, and left the area. The witnesses in this case also know the Defendant, and [illegible] in the area, to give statements to the police. The Defendant is a member of the black gangster disicple [sic] street gang, and makes his money from the sale of narcotics, and is a user of marijuana.

DUE TO THE NATURE OF SUBJECT'S OFFENSE AND KNOWN DRUG USE AND GANG AFFILIATION, CONSIDERED ARMED AND DANGEROUS

Approved Special Agent

Copies made: [ENCLOSURE [Illegible]

2 – Bureau 1 – ENCLOSED

2 – Chicago

Do not write in spaces below

88-98346-1X1
15 MAY 31 1990

Notations:

MUHAMMAD D. BINWALEE

On July 3, 1988, the CIRCUIT COURT OF COOK COUNTY, Illinois, issued an arrest warrant for the charge of murder – Chapter 38, Section 9-1a2 of the Illinois Revised Statutes – against the subject BINWALEE, with case docket number 88-236608.

On May 6, 1989, this case was assigned to the FEDERAL BUREAU OF INVESTIGATION (FBI), Violent Crimes Task Force (VCTF) after, it was believed by the CHICAGO POLICE DEPARTMENT that the subject had fled the State of Illinois to avoid prosecution.

After an investigation conducted by the VCTF, on June 29, 1989, a federal complaint was filed in the United States District Court, Northern District of Illinois, Eastern Division charging the subject BINWALEE with Unlawful Flight to Avoid Prosecution, Title 18 Section 1073 of the U.S. Code. A federal UFAp warrant was issued the same day by U.S. MAgistrate JAMES T. BALOG, under Docket number 89CR0583.

FACTS AS TO DANGEROUSNESS:

BINWALEE is a known affiliate of the Black Gangster Disciples (BDG) street gang and has had previous arrest for the possession of marijuana and various firearm weapons violations.

Since June 29, 1989, leads to various field offices has shown the subject having been seen in Los Angeles, California; Milwaukee, Wisconsin; and Gary, Indiana.

BINWALEE"S known criminal history sheets are attached to this report.

DETAILED PHYSICAL DESCRIPTION:

Name:	MUHAMMAD D. BINWALEE
Aliases:	Anthony Bryant, Anthony Howard, Anthony Howards, Walee Bimwaler, Muhammad Binwale, Haroon Binwalee, Haroon Bin Walee
Sex:	Male

PO15-B S-89 SUPPLEMENT REPORT
MILWAUKEE POLICE DEPARTMENT

0 INCIDENT SUPPLEMENT
0 ACCIDENT SUPPLEMENT
0 JUVENILE SUPPLEMENT PAGE 1 of 2

DATE OF REPORT 05-02-91

INCIDENT/ACCIDENT # 91-15848/M2410

INCIDENT INFORMATION

INCIDENT HOMICIDE (SHOOTING)

DATE OF INCIDENT/ACCIDENT
03-08-91 (discovery date) REP CON #

VICTIM RUSSELL, Dion V.

LOCATION OF INCIDENT/ACCIDENT (Address)
941 S. 35th Street DIST 6

JUVENILE LAST NAME FIRST MID

DATE OF BIRTH 0 DETAINED
0 ORDERED TO MCCC
0 OTHER

LOAN SERIAL # TYPE OF PROPERTY CODE # DESCRIPTION VALUE

On Monday, 4-22-91, from approximately 4:01PM until 7:40PM, an interview of *Joseph ISAJIW* was conducted in the 4th floor Conference Room, located in the CIB, by *Detectives Paul STUHMER and Brian O'KEEFE.*

During this interview, Joseph ISAJIW admitted involvement in this offense. A summary of his statement was reduced to writing and was eventually attached to his arrest report (contained in Homicide file).

During this interview, the suspect was questioned regarding the location of the weapons used in this offense. I informed him we were interested in the recovery of these weapons and ISAJIW eventually responded, "The guns used in this offense were possibly still in the possession of a family member". He was reluctant to identify this family member, stating he did not want to get the relative involved. ISAJIW was told we were only interested in obtaining the weapons used in this offense. ISAJIW stated he would make a phone call for us and would attempt to accomplish the recovery of the weapons. He also made the suggestion that he, ISAJIW, make arrangements to have the guns mailed to us.

At that time we informed him that it would be a violation of Federal laws to send firearms through the United States mail. Joseph ISAJIW indicated that he would make a telephone call and would attempt to assist us in the recovery of the weapons used in this offense, if arrangements could be made to leave his relatives out of this matter.

Arrangements to recover the weapons were not completed on this date.

On Tuesday, 4-30-91, at 7:PM, I met with Joseph ISAJIW in the Milwaukee County Jail where he is currently incarcerated and awaiting court proceedings regarding this matter. The purpose of this contact was to obtain the name of ISAJIW'S attorney. I told ISAJIW that I wanted to contact his attorney and submit my request for assistance in the recovery of these weapons, through his attorney. At that time Joseph ISAJIW did not know the name of his attorney, however he related that his attorney was a member of the Public Defender's office.

I informed Joseph ISAJIW that I would contact the Public Defender's office in an attempt to identify his attorney and contact the subject with my request.

On Wednesday, 5-1-91, I contacted the Public Defender's office and learned Joseph ISAJIW'S current attorney is Thomas HAYES.

At 4:07PM, I contacted Attorney *Thomas HAYES at* his office phone number, #271-9844. At that time I explained this situation to him and informed him of my request for these weapons. Mr. HAYES related that he had intentions of meeting with *Joseph ISAJIW* and he would contact me on Thursday, 5-2-91. I had informed Mr. HAYES of my identity and work location. I further informed him that Joseph ISAJIW had a card with my name and phone number on it and that I had indicated to ISAJIW that he should supply this information to his attorney, in the event I could not locate the person.

Report per *Det. STUHMER.*

PS: gb 5-3-91

Note: On *thee* [sic] occasions they attempted to adamantly retrieve those weapons, then all of a sudden decides to *Drop* It?

M 2410 / SEC 4 / PAGE 174

REPORTING OFFICER	PAYROLL #	LOC CODE	SUPERVISOR SIGNATURE
DETECTIVE PAUL STUHMER	40490	91	

[LOGO]

State of Wisconsin

Department of Corrections

[LOGO]

Tommy G. Thompson
Governor

Michael J. Sullivan
Secretary

Mailing Address
149 East Wilson Street
Post Office Box 7925
Madison, WI 53707-7925
Telephone (608) 266-2471

November 16, 1998

Jill M. Rhoda
Interstate Corrections Compact Administrator
Department of Corrections
PO Box B
2305 Minnesota Blvd., SE
St. Cloud, MN 56302-1000

RE: Scott Heimermann, WI DOC #159200

Dear Ms. Rhoda:

I am requesting your review of Mr. Heimermann for acceptance under the terms of the interstate correction compact between our states.

Mr. Heimermann cooperated with authorities in Wisconsin regarding security issues within our institutions and has provided critical information concerning an on-going investigation Pierce County. His placement out-of-state is considered critical.

Please contact my office when you have made a decision on this request.

If you have questions, please contact my office at 608/266-2395.

Sincerely,

/s/ Stephen M. Puckett
Stephen M. Puckett, Director
Bureau of Offender Classification and Movement

Scott Heimerman, 6/7/99

William Puckett is the Interstate Compact Director here in Wisconsin that I spoke to last week. He is over the Warden, in fact he's in Madison along with the director of the whole DOC.

CCI has no plans at this time to bring Piscatello back to Wisconsin.

Have you ever considered getting a public defender attorney – or any attorney for that matter? – to acquire this evidence that you need?

It looks like if you want to facilitate the call you will need to hire a legal transcriptionist to depose Piscatello over the phone. This is still a call from an inmate to another inmate so that's why I thought an attorney could bridge the gap for you.

I imagine that (Ms) Lt. J. Whitenmeyer, the officer in charge of legal affairs will probably not call me back, but we'll see. You will need to do most, if not all, your legal correspondences by mail. Capt. Schwandt will be back next week. She and I work pretty well together.

/s/ Ilene Lawson
Social Worker

(9) The clerk in Minnesota would not take change of addresses over/the phone – send it in writing.

Clerk US. District Court
708 Federal Bldg.
316 N. Robert Street
St Paul MN. 55101

(10) The number at Glendale Mun. Court is 414 228-1752 ~~not 228-1713~~

I have tried twice to get through but could not (6/3) They do not make outgoing long distance calls.

They did say that requests for changes needed to be in writing. I don't know what changes they were talking about.

(11) I talked to our WI Interstate compact person and he stated that WI has no authority in the day to day supervision of Piscatello. In other words we cannot force ~~Piscatello to~~ Florida to let Piscetello ~~to~~ talk to you. WI would have to bring him back here before we could set things up and that would probably not be done because of his safety. I have made a good faith effort to try to set this up and to date there is no cooperation

(2)

No. 04-1664

Supreme Court, U.S.
FILED
AUG 5 - 2005
OFFICE OF THE CLERK

In The

Supreme Court of the United States

IN RE SCOTT A. HEIMERMANN,

Petitioner.

SUPPLEMENTAL BRIEF

SCOTT A. HEIMERMANN
200 South Madison Street
P.O. Box 0351
Waupun, Wisconsin 53963-0351
(920) 324-5571, Extension 7190

SUPPLEMENTAL QUESTION PRESENTED

1. Whether this Court should invoke its inherent equitable power to review material that was never decided on the merits by the United States Court of Appeals for the Seventh Circuit and United States District Court for the Eastern District of Wisconsin so that the lower courts can right a grave wrong under the principles of *Gonzalez v. Crosby*, 545 U.S. ___, 125 S. Ct. 2641 (2005) when there is the potential existence of a fraud upon the court?

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I. THE WRIT SHOULD BE GRANTED BECAUSE THE 'SPECIAL CIRCUMSTANCES' OF THIS CASE – THAT, IF LEFT UNADDRESSED, WILL RESULT IN A GRAVE MISCARRIAGE OF JUSTICE – JUSTIFIES THIS COURT'S INVOCATION OF ITS INHERENT EQUITABLE POWER TO REVIEW MATERIAL THAT WAS NEVER DECIDED ON THE MERITS BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN SO THAT THE LOWER COURTS CAN RIGHT A GRAVE WRONG UNDER THE PRINCIPLES OF *GONZALEZ V. CROSBY*, 545 U.S. ___, 125 S. Ct. 2641 (2005) WHEN THERE IS THE POTENTIAL EXISTANCE OF A FRAUD UPON THE COURT 4

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SUPPLEMENTAL OPINIONS BELOW

The supplemental opinions below to the supplemental proceeding are *reprinted* in App. 1 to App. 9 of this supplemental petition.

SUPPLEMENTAL JURISDICTION

The undersigned respectfully submits that in addition to the jurisdictional authority cited in the original habeas petition filed on June 1, 2005 in this matter, that this Court has jurisdiction in the case at bar to exercise its inherent equitable powers to review material not decided on the merits by the United States Court of Appeals for the Seventh Circuit and United States District Court for the Eastern District of Wisconsin to right a very grave miscarriage of justice. *Cf. Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244, 64 S. Ct. 997, 88 L. Ed 1250 (1944) (recognizing a court's inherent power to grant relief for "after-discovered fraud," from an earlier judgment, "regardless of the term of [its] entry").

SUPPLEMENTAL CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the constitutional provisions and statutes cited in the petition for a writ of habeas corpus filed on June 1, 2005, this case also involves Federal Rule of Civil Procedure 60(b).

SUPPLEMENTAL STATEMENT OF THE CASE

On October 30, 1995, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Wisconsin. (DCTR 1).[1] He also filed a comprehensive memorandum supporting his submission that his habeas

[1] District Court Record ("DCTR"). *See* Civil Docket for case # 95-C-1101.

petition should be granted. (DCTR 4). He argued, *inter alia,* that the Wisconsin prosecuting authorities were guilty of serious misconduct; and that trial counsel's (Martin E. Kohler's) conduct failed to render effective assistance of counsel guaranteed by the Sixth Amendment by failing to conduct a reasonable investigation of Edward J. Piscitello's employment history with the government at the time he (Piscitello) initiated contact with petitioner in April of 1989, including the fact that the government thereafter induced an innocent party (petitioner) to participate in the complained of activity at the time of the 1989 offense for which petitioner is incarcerated, and present this powerful, readily available exculpatory evidence, and by failing to pursue known leads that would have helped them prepare their case insofar as petitioner did not commit the unlawful acts, or did not commit them with the requisite unlawful intent, which was consistent to the defense presented at trial. On January 5, 1996, the district court dismissed the petition in majority part and ordered respondent to file an answer on the remaining claims (DCTR 5). (App. 23 to App. 34 of original petition.) Petitioner then filed a motion for reconsideration of the January 5, 1996 order (DCTR 6). That motion and the remaining claim of the petition for writ of habeas corpus was denied on March 19, 1996 (DCTR 16). Petitioner filed a motion and memorandum for reconsideration on March 26, 1996, which were denied on June 12, 1996 (DCTRs 18,19,20). On June 20, 1996, petitioner filed a motion to amend the habeas petition and for reconsideration of the order denying reconsideration; that motion was denied on July 1, 1996 (DCTRs 21,22). On July 10, 1996, petitioner filed a motion and memorandum for reconsideration from the July 1, 1996 order, and on July 15, 1996, he filed a motion to require the furnishing of police reports (DCTRs 24,25). All these motions were denied on July 22, 1996 (DCTR 26).[2] On August 1, 1996, petitioner filed a notice of

[2] While working at his prison job in 1996, petitioner happened upon an inmate transfer document relating to prisoners being transferred out of

(Continued on following page)

appeal from all these orders (DCTR 27). That appeal was docketed in the Seventh Circuit as No. 96-3567. On February 21, 1997, the Seventh Circuit dismissed the appeal for lack of jurisdiction as to the judgment entered on March 19, 1996 and order denying reconsideration entered on June 17, 1996, and summarily affirmed as to the orders of July 1, 1996, and July 22, 1996 (DCTR 33), and this Court denied petitioner's petition for certiorari on June 2, 1997, 520 U.S. 1258, 117 S. Ct. 2424, 138 L. Ed. 2d 187 (1997). The proceedings that were thereafter initiated raise the questions now before this Court.

On June 24, 2002, petitioner filed a motion, pursuant to Federal Rule of Civil Procedure 60(b)(6) and Rule 60(b)(4), seeking relief from the January 5, 1996 judgment dismissing the habeas petition, including a comprehensive memorandum and appendix supporting his submissions that his Rule 60(b) motion should be granted (DCTRs 47,48). Essentially petitioner had argued that he uncovered new evidence (now proving the identically raised 1995 claims) in the landscape of state attorney fraud, which incidentally, also now proved that the district court's 1996 ruling that Piscitello's employment with the government allegations were "conclusory" or "fanciful" rested on a mistaken premise. In petitioner's view, that mistake constituted a "reason justifying relief from the operation of the judgment" within the meaning of Rule

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the Wisconsin prison system. That transfer document showed that one of the prisoner's names on it was Piscitello who was being transferred to an undisclosed out of state facility because he was deemed a witness protection inmate. And so in all these motions that petitioner had filed with the district court petitioner was emphatically asking the district court to grant him leave to take the oral deposition of Piscitello, relative to petitioner clearing his name in the 1989 offense for which he is incarcerated. He also asked the district court to enter an order enjoining Piscitello's transfer until the proposed testimony of Piscitello was furnished. The district court denied all these non-frivolous requests. This is why petitioner got state prison officials to promise in 1998 to help him locate and then obtain an oral deposition from Piscitello (who at the time was in witness protection custody at an undisclosed out of state facility). (*See* petitioner's original petition at 18-19.)

60(b)(6). Finding that the motion was filed outside the one-year period, the district court denied the motion on July 8, 2002 (DCTR 50). (App. 1 to App. 5 of this supplemental petition.) Petitioner filed a notice of appeal on July 30, 2002 (DCTR 51). The appeal was docketed in the Seventh Circuit as No. 02-3038. On October 24, 2002, the Seventh Circuit vacated the judgment entered on July 8, 2002 and remanded the case to the district court with directions to dismiss the Rule 60(b) motion for lack of subject matter jurisdiction pursuant to its legal rule of *Dunlap v. Litscher,* 301 F.3d 873 (7th Cir. 2002). (App. 8 to App. 9 of this supplemental petition.) On December 18, 2002, the district court therefore vacated its order of July 8, 2002, and dismissed petitioner's Rule 60(b) motion for want of subject matter jurisdiction (DCTR 58). (App. 6 to App. 7 of this supplemental petition.)

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

I.

THE WRIT SHOULD BE GRANTED BECAUSE THE 'SPECIAL CIRCUMSTANCES' OF THIS CASE – THAT, IF LEFT UNADDRESSED, WILL RESULT IN A GRAVE MISCARRIAGE OF JUSTICE – JUSTIFIES THIS COURT'S INVOCATION OF ITS INHERENT EQUITABLE POWERS TO REVIEW MATERIAL THAT WAS NEVER DECIDED ON THE MERITS BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN SO THAT THOSE LOWER COURTS CAN RIGHT A VERY GRAVE WRONG UNDER THE PRINCIPLES OF *GONZALEZ V. CROSBY,* 545 U.S. ___, 125 S. CT. 2641 (2005) WHEN THERE IS THE POTENTIAL EXISTANCE OF A FRAUD UPON THE COURT

Although the supplemental part of this case may be governed by the Anti-Terrorism and Effective Death

Penalty Act of 1996 ("AEDPA"), in light of the fact that the lower federal courts have already ruled on petitioner's initial habeas petition, and thus petitioner is obliged to satisfy the requirements for the filing of a second or successive petition outlined in 28 U.S.C. § 2244(b); it does not matter here, because the AEDPA does not bar a second or successive petition premised upon fraud upon the court. *Cf. Calderon v. Thompson,* 523 U.S. 538, 556-57, 118 S.Ct. 1489, 140 L. Ed. 2d 728 (1998) (holding that the principles of the AEDPA apply in general to a recall of the mandate because a "State's interests in finality are compelling when a federal court of appeals issues a mandate denying federal habeas relief;" exempting claims of "fraud upon the court, calling into question the very legitimacy of the judgment"). Indeed, in *Calderon,* this Court stated that "a mandate may be recalled when it is necessary to address new circumstances before the court which are 'grave' and 'unforeseen' or which are, in other words, unforeseeable circumstances which implicate the justice of the judgment previously rendered." *Calderon,* 523 U.S. at 549, 118 S.Ct. 1489.

And so the issue here is whether attorneys for the Wisconsin Department of Justice may have intentionally, or at a minimum recklessly, failed to timely and properly present critical evidence to the district court and the Seventh Circuit – evidence which, would have entitled petitioner to habeas relief in 1996. Simply put, the question is this: how and why did state attorneys fail to timely and properly present evidence of Piscitello's employment with the government at the time Piscitello initiated contact with petitioner in April of 1989 and thereafter the government inducing an innocent man (petitioner) to participate in activity at the time of the 1989 offense for which petitioner is convicted and sentenced. This evidence would have substantially impaired the state's ability to show that petitioner's claims were procedurally defaulted. For example, there simply wasn't any reason for the district court to serve the interests of comity and federalism in this case. The petitioner's alleged failure to raise

his ineffective assistance and prosecutorial misconduct claims could not be considered a procedural default because the 1991 criminal proceedings to begin with were wrongly procured as a result of state prosecutors' fraud on the state courts, and, therefore, there ostensibly was no legitimate bases to petitioner's state conviction to which the district court deferred when it summarily dismissed the original habeas corpus proceedings. *See In Re James,* 940 F.2d 46, 52 (3rd Cir. 1991) ("There appears to be only one exception to this hard and fast rule of federal-state comity, and it comes into play when the state proceedings are considered a legal nullity and thus void *ab initio* . . . because a void judgment is null and without any effect, the vacating of such a judgment is merely a formality upon the notion of mutual respect in federal-state interests"). Thus, from day one petitioner's claims were never technically procedurally defaulted.

This matter is therefore somewhat like *Demjanjuk v. Petrovsky,* 10 F.3d 338 (6th Cir. 1993).[3] There, on its own motion, the United States Court of Appeals for the Sixth Circuit vacated the judgment of the district court denying the petitioner's writ of habeas corpus upon finding that the judgments in the underlying extradition proceedings were wrongly procured as a result of prosecutorial misconduct that constituted fraud on the court.[4] *Id.* at 356. As in *Demjanjuk,* the Supreme Court must decide if "the conduct outlined herein constitutes fraud on the court or

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[3] Although *Demjanjuk* involved misconduct by federal prosecutors, the undersigned respectfully submits that there is no reason why state attorneys should not be held to a similar standard of integrity.

[4] Specifically, the Sixth Circuit found that attorneys for the Department of Justice Attorneys "acted with reckless disregard for the truth and for the government's obligation to take no steps that prevent an adversary from presenting his case fully and fairly" when they withheld exculpatory materials from the petitioner. *Demjanjuk v. Petrovsky,* 10 F.3d 338, 354 (6th Cir. 1993).

attorney misconduct sufficiently serious to require corrective action on our part." *Id.* at 352.[5]

The first and second fraud on the court factors as observed in *Demjanjuk* appear to be easily met in the case at bar. Wisconsin Department of Justice attorneys are clearly officers of the court, *see generally Hickman v. Taylor,* 329 U.S. 495, 510, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (noting that "[h]istorically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients"), and their representation of Wisconsin prosecuting authorities in petitioner's initial habeas proceedings was and is clearly directed at the judicial machinery of the court.

The fourth and fifth factors as observed in *Demjanjuk* also appear to be present. Although attorneys for the Wisconsin Department of Justice had an obligation, as part of their duty to represent zealously their client (the Wisconsin prosecuting authorities), they also had an obligation to present to the federal court material, critical, *available* evidence, which in this case would virtually have ensured the relief petitioner requested in his initial federal habeas corpus petition. This meant presenting, by affidavits or otherwise, proof of Piscitello's employment with the government, both state and federal, at the time he (Piscitello) initiated contact with petitioner in April of 1989, and thereafter the government beguiling an innocent man (petitioner) to engage in the activities that resulted in the 1989 offense upon which petitioner is incarcerated in response to the district court's order of January 5, 1996. Therefore, both the district court and

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[5] As the Sixth Circuit observed in *Demjanjuk,* fraud upon the court is defined as consisting of (1) conduct by an officer of the court, (2) directed towards the judicial machinery itself, that is (3) intentionally false, willfully blind to the truth or is in reckless disregard for the truth, is (4) a positive averment or concealment when one is under a duty to disclose, and that (5) deceives the court. *Id.* at 348.

Seventh Circuit were deceived. They were mislead into believing that significant mitigating evidence of petitioner's alleged procedural default (actual innocence) at the time of the original habeas corpus proceedings did not exist. It quite clearly did exist, *and that evidence was in the Wisconsin Department of Justice attorneys' possession,* via the Wisconsin prosecuting authorities, prior to the filing of the state attorneys' letter brief in opposition for order allowing petitioner's traverse to the respondent's answer or to petitioner's motion to amend his habeas petition and to petitioner's motion for reconsideration of the district court's order dated January 5, 1996, which state counsel filed on January 23, 1996 (DCTR 8), or prior to the filing of the state attorneys' response to petition for writ of habeas corpus, which state counsel filed on February 15, 1996 (DCTR 10), and prior to the state attorneys' filing of a letter in opposition to motion to supplement the pleadings to petitioner's traverse, which state counsel filed on March 5, 1996 (DCTR 14). In other words, the district court assumed that probative evidence as to Piscitello's employment with the government at the time of initiating contact with petitioner and at the time of the 1989 crime did not exist because state counsel failed to present it. Based on the natural assumption that such evidence did not exist because it was not presented at the habeas dismissal stage, the district court held that petitioner's allegations were "conclusory, fanciful, and even if true, would do little or nothing to undermine confidence in the result of [petitioner's] trial." (App. 31 of original petition.)

This leaves the third *Demjanjuk* factor. Here the question is whether the Wisconsin Department of Justice attorneys' conduct in failing to present available evidence of the government's involvement at the time of the 1989 crime was intentionally false, willfully blind to truth, or in reckless disregard for the truth. The principal bases for petitioner's petition and motions to amend petition for writ of habeas corpus were his allegations that trial counsel's investigation into Piscitello's background employment

with the government at the time Piscitello initiated contact with petitioner in April of 1989 did not reflect reasonable professional judgment in light of what trial counsel knew and suspected;[6] and prosecutorial misconduct based on the simple premise that the government egregiously invaded petitioner's innocent life and thereafter induced petitioner (an "unwary innocent") to participate in activities at the time of the 1989 offense, thereby requiring *suppression* of all post-April 1989 activities of petitioner, which typically occurs in cases with outrageous government conduct.[7]

So state counsel taking affirmative steps that prevented petitioner from presenting his habeas case fully and fairly when he knowingly withheld exculpatory materials from the petitioner relating to Piscitello's employment with the government situation in 1989 can be conceived of as "a fraud perpetrated . . . so that judicial machinery cannot perform in the usual manner." That is

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[6] *Cf. Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527, 2542, 156 L. Ed. 2d 471 (2003) (holding that trial counsel's decision to end their investigation when they did was unreasonable in light of the evidence uncovered in the social service records).

[7] Applying the principals as established in *Russell v. United States*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643, 36 L. Ed. 2d 366 (1973) and *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952), petitioner can actually overturn his conviction by proving (a) under the "scope of employment" rule that Piscitello was in fact acting in furtherance of the government's work at the time he initiated contact with petitioner in April of 1989 and (b) that petitioner was not indeed engaged in any criminal activity in April of 1989. Therefore, *Russell* and *Rochin* demonstrate that all the progression of events that Piscitello (the government) induced petitioner to participate from April of 1989 to the August 1989 murders must be removed from the testimonies of those state witnesses used against petitioner, at which no reasonable fact-finder could conclude that petitioner were a party to the 1989 offense upon which he was convicted. This suppression analysis also covers the succession from petitioner's arrest to extradition to the criminal complaint to the preliminary hearing to bindover. In a word, petitioner and his family should not have been subjected to the disgrace and humiliation of a trial here.

precisely what happened in this case. The district court and Seventh Circuit were prevented from administering full justice because those courts lacked all of the vital information necessary to afford the proper relief. Thus, but for Wisconsin Department of Justice attorneys' fraud, this habeas matter would have gone in a different direction, and petitioner would have been released to outright freedom as planned in 1996 – especially since state attorneys had precisely what petitioner needed to prove his ineffective assistance of trial counsel and outrageous government conduct claims, as reflected by petitioner's 1995 habeas petition and supporting papers.

CONCLUSION

For the above reasons and those as established in petitioner's original habeas petition filed on June 1, 2005 the Supreme Court of the United States should invoke those inherent equitable powers to protect the integrity of the judicial process within the Court's appellate jurisdiction and thus grant the prayed for writ and remand the case to the district court or a duly-appointed Special Master under the authority of 28 U.S.C. § 2241(b) with directions to conduct a prompt and full evidentiary hearing on petitioner's non-frivolous claims of ineffective assistance of trial counsel, outrageous government conduct and fraud upon the court, so as to ascertain the truth.

Dated at Waupun, Wisconsin this 5th day of August 2005.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

Case No. 95-C-1101

GORDON A. ABRAHAMSON,

Respondent.

ORDER

(Filed July 8, 2002)

On October 30, 1995, Scott Heimermann, filed in this court a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his 1992 state court conviction on two counts of first degree intentional homicide. He claimed that his trial had been marred by numerous constitutional defects, including ineffective assistance of counsel. In support of his ineffective assistance claim he asserted that his attorney should have consulted with him regarding certain strategic decisions, should have investigated the alleged relationship between a key witness and law enforcement (including certain officers' knowledge of, and possible acquiescence in, the murders), and should have challenged the authenticity of a particular piece of evidence introduced against him.

The court reviewed Mr. Heimermann's claims pursuant to Rule 4 of the Rules Governing Section 2254 Cases and found them all to be legally or factually unsupportable, with the exception of the ineffective assistance (sub)claim premised on counsel's failure to challenge the authenticity of certain evidence. Accordingly, on January

5, 1996, the court summarily dismissed all of Mr. Heimermann's claims but the one. With respect to the (sub)claim that counsel should have investigated law enforcement's possible knowledge of, or acquiescence in, the charged murders, the court found Mr. Heimermann's assertions "conclusory, fanciful, and even if true, would do little or nothing to undermine confidence in the result of Heimermann's trial." (*Heimermann v. Abrahamson,* No. 95-C-1101 at 11 (E.D. Wis. Jan. 5, 1996.)

On June 24, 2002, Mr. Heimermann filed a Federal Rule of Civil Procedure 60(b) motion for reconsideration of the court's January 5, 1996 decision summarily dismissing his ineffective assistance of counsel subclaim premised on failure to investigate the alleged relationship between a witness and law enforcement officials. He asserts that in 2000 he initiated contact with the witness and that the witness verified that he had worked with law enforcement[1] as a confidential informant, that he had warned his handlers prior to the murders that they might be forthcoming, and that his handlers did nothing to prevent them. Thus, Mr. Heimermann asserts, his 1995 allegations were not fanciful (as the court had previously suggested).

Rule 60(b) relief is considered "an extraordinary remedy that is to be granted only in exceptional circumstances." *Provident Sav. Bank v. Popovich,* 71 F.3d 696, 698 (7th Cir. 1995). Because finality is an important value in a procedural system, a litigant who seeks to set aside a

[1] It appears that the witness admitted to working with law enforcement officers investigating drug activity, not the officers who investigated the murders of which Mr. Heimermann was convicted, or any other officer associated with Mr. Heimermann's case. The exact contours of the supposed admission are not entirely clear, however.

final judgment under Rule 60(b) has an especially heavy burden; among other things he must demonstrate that he has a meritorious position in the underlying suit. *See Philips Med. Sys. Int'l B.V. v. Bruetman,* 8 F.3d 600, 603 (7th Cir. 1993).

Pursuant to Rule 60(b), a court may grant relief from judgment only under the particular circumstances listed in the rule. *Russell v. Delco Remy Div. of Gen. Motors Corp.,* 51 F.3d 746, 749 (7th Cir. 1995). Those are:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Importantly, clause (6) is mutually exclusive of the first three clauses; if the asserted grounds for relief fall within the terms of clauses (1)-(3), relief under the catchall provision of subsection (6) is not available. *Brandon v. Chicago Bd. of Educ.,* 143 F.3d 293, 295 (7th Cir. 1998). This distinction is significant because clauses (1)-(3) have a one-year statute of limitations, *see* Fed. R. Civ. P. 60(b), while motions for reconsideration under clause (6) may be filed at any "reasonable time," *id.*

Here, Mr. Heimermann asserts that the court's January 5, 1996 judgment may be set aside under clause (4) or (6) of Rule 60(b). As he has not provided any basis for suggesting that the court did not have jurisdiction to hear his petition for a writ of habeas corpus in 1996 or that in adjudicating it the court acted in a manner inconsistent with due process, however, relief may not be granted under clause (4). *Cf. In re Edwards,* 962 F.2d 641, 644 (noting that a judgment is void for the purposes of Rule 60(b)(4) "if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law"). Similarly, as the whole premise of his motion is alleged newly-discovered evidence, relief may not be granted under clause (6).[2] *Cf. Brandon,* 143 F.3d at 295 (relief is not available under clause (6) for claims whose grounds would implicate clauses (1)-(3), including newly-discovered evidence). As Mr. Heimermann's motion lacks a basis in law, the motion must be denied.[3]

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[2] Relief may not be granted under the newly-discovered evidence clause, (2), because more than a year has passed since the court entered the judgment Mr. Heimermann wishes it to reconsider. *See* Fed. R. Civ. P. 60(b).

[3] The court notes that Mr. Heimermann's motion could alternatively be denied on the ground that it in no way suggests he had a meritorious position in the underlying petition. *Cf. Philips,* 8 F.3d at 603 (noting that reconsideration will not be granted unless the movant can show that his or her original action had merit). He has never demonstrated that reasonably competent counsel would have discovered the alleged circumstances of the relationship between the witness and law enforcement officials or that exposure of the relationship would have created a reasonable probability of a different result at trial. *Cf. Strickland v. Washington,* 466 U.S. 668, 294 (1984) (establishing elements of ineffective assistance of counsel claim).

Accordingly,

IT IS ORDERED that Mr. Heimermann's motion for reconsideration pursuant to Rule 60(b) be and the same is hereby **DENIED**.

Dated at Milwaukee, Wisconsin, this 8th day of July, 2002.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
Chief Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

SCOTT A. HEIMERMANN,

Petitioner,

v.

Case No. 95-C-1101

GORDON A. ABRAHAMSON,

Respondent.

ORDER

(Filed Dec. 18, 2002)

This matter is before the court on remand from the United States Court of Appeals for the Seventh Circuit. On October 30, 1995, *pro se* petitioner Scott Heimermann filed with this court a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 challenging his 1992 Wisconsin state court conviction for murder. On January 5, 1996, the court summarily dismissed his petition. On June 24, 2002, Heimermann filed a Federal Rule of Civil Procedure 60(b) motion for reconsideration of the court's denial of his petition premised on his trial counsel's failure to investigate an alleged relationship between a witness and law enforcement officials. On July 8, 2002, the court denied Heimermann's Rule 60(b) motion on the merits. On appeal, the Seventh Circuit vacated this court's July 8 order citing *Dunlap v. Litscher*, 301 F.3d 873, 875-76 (7th Cir. 2002) and in turn, *Harris v. Cotton*, 296 F.3d 578, 579-80 (7th Cir. 2002). (Both were decided subsequent to this court's order.) The court of appeals determined that the motion should have been dismissed for want of jurisdiction pursuant to 28 U.S.C. § 2244(b)(3) as an unauthorized

successive *habeas* petition. *Heimermann v. McCaughtry*, No. 02-3038 (7th Cir. 2002) (unpublished order). As acknowledged in *Dunlap*, the matter of the interrelationship between the AEDPA and Rule 60(b) is currently before the Supreme Court in *Abdur'Rahman v. Bell*, ___ U.S. ___, 122 S. Ct. 1605, 152 L. Ed. 2d 620, 70 U.S.L.W. 3650 (2002). (The case was argued on November 6, 2002.) In the interim this court is obliged to follow the Seventh Circuit's lead and dismiss Heimermann's Rule 60(b) motion for want of jurisdiction.

Accordingly,

IT IS ORDERED that Heimermann's Rule 60(b) motion be and the same is hereby **DISMISSED** for want of jurisdiction as an unauthorized successive *habeas* petition pursuant to 28 U.S.C. § 2244(b)(3).

Dated at Milwaukee, Wisconsin, this 18th day of December, 2002.

BY THE COURT:

/s/ J. P. Stadtmueller
J. P. Stadtmueller
U.S. District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 11, 2002
Decided October 24, 2002

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. FRANK H. EASTERBROOK, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

No. 02-3038

SCOTT A. HEIMERMANN,
Petitioner-Appellant,

v.

GARY R. McCAUGHTRY,
Respondent Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin

No. 95-C-1101

J.P. Stadtmueller,
Judge.

ORDER

In June 2002, Scott Heimermann, a convicted murderer, filed a purported Federal Rule of Civil Procedure 60(b) motion in the district court. This motion sought to re-open a 1995 habeas corpus case. The 1995 habeas corpus attempt was actually only one of several; at last count, Heimermann has filed three separate 28 U.S.C. § 2254 petitions and a veritable barrage of requests for permission to file more. In Heimermann's latest maneuver, he argues that he has obtained "new evidence" showing that he was framed by law enforcement agents. Although Heimermann attempts to squeeze his arguments into Rule 60(b)'s framework, they are really the stuff of a new § 2254 petition. As such, the district court should have dismissed

Heimermann's motion for want of jurisdiction as an unauthorized successive habeas corpus petition. *See* 28 U.S.C. § 2244(b)(3); *Dunlap v. Litscher,* 301 F.3d 873 (7th Cir. 2002). We now VACATE the judgment and REMAND the case so that it may do so. The PETITIONER'S NOTICE OF MOTION AND MOTION FOR ADMISSION TO BAIL PENDING APPELLATE REVIEW, filed on October 3, 2002, by the pro se appellant is DENIED. The motion to proceed on appeal in forma pauperis is DENIED.